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Department of Justice Defending The Indefensible: A \$750,000,000 Clinton-Gore Giveaway to “Green Group” Lobbyists

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Don Young, Chairman

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Majority Staff Report

FINAL

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and may not therefore necessarily reflect the views of its Members

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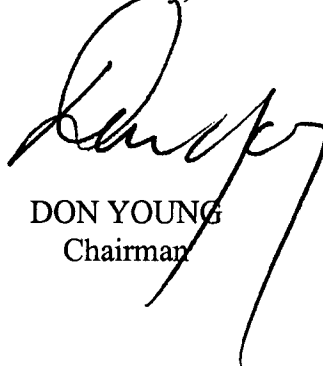
Dear Committee on Resources Member:

On February 24, 1998, I initiated an oversight review on the decision to terminate the Alaska Pulp Corporation (APC) long-term timber contract. Our Committee has reported legislation on this contract in the past. The termination of the contract may result in a significant liability (\$750,000,000, perhaps more) to the government for wrongful breach.

The oversight review resulted in production of numerous documents (probably in excess of 10,000 pages) from USDA, DOJ, CEQ, and the Forest Service, which were completed on December 14, 1999. The draft majority staff report, "Department of Justice Defending The Indefensible: A \$750,000,000 Clinton-Gore Giveaway to 'Green Group' Lobbyists," chronicles the decision-making that led to the contract breach by the government based on the documents produced for the oversight review. The report contains detailed information about the lacking basis for the multi-million dollar decision, and the Court of Claims analysis of the linchpin liability issue (whether operation of the APC pulp mill was required under the contract). The Court of Claims recently granted summary judgment for APC, so the issue of liability is basically decided.

So that you have the benefit of the information and analysis of this atrocious decision by the government, I am releasing the text of this draft report. I will make copies available for review and reproduction in the committee office. When the appendices are added and the report finalized, I intend to have it printed and distributed to each of you. It is my hope that through this report, the Members and the public will critically examine what will probably be the single largest successful contract damage breach claim against the USDA, Forest Service. I furthermore hope that we can work on timber contracting legislation to prevent this type of ill-informed, expensive decision in the future.

Sincerely,



DON YOUNG
Chairman

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welsh \ˈwelsh, ˈwelch\ *vi* [prob. Fr. *Welsh*, adj.] (1857) **1** : to avoid payment – used with *on* <*ed* on his debts> **2** : to break one’s word : RENEGE <on his promises> – **welch•er** *n*

I. Introduction

On October 15, 1957, the Alaska Pulp Corporation¹ (APC) and the United States (through the Forest Service) entered a 50 year contract for timber from the Tongass National Forest.² On April 14, 1994, the Clinton-Gore Administration, at the urging of environmental special interest lobbyists and with the apparent blessing of the Department of Justice, terminated the contract, thereby breaching it and welching on obligations of the United States for the remaining 17 years of that contract.³

That breach by the United States took an enormous toll on residents of Sitka, Alaska and the whole of Southeast Alaska’s Tongass National Forest.⁴ The action will also take a toll on the United States Treasury, and it will cost the taxpayers as much as \$750,000,000, an amount equal to approximately one-quarter of the annual budget of the Forest Service. In addition, salaries of lawyers and staff that consumed six years were wasted defending the irresponsible decision. To recover

¹ The Alaska Pulp Corporation is a wholly-owned subsidiary of the Alaska Pulp Co., Ltd., and was formerly the Alaska Lumber & Pulp Company, Inc.

² USDA, Forest Service, Contract No. 12-11-010-1545.

³ Appendix 1, April 14, 1994, letter from Regional Forester, Mike Barton to Mr. George Woodbury, Alaska Pulp Corporation.

⁴ Approximately 400 direct jobs (an annual payroll of \$18 million) were lost due to the closure of the Alaska Pulp mill. This was ten percent of the local employment base and 16 percent of the local wage and salary income. The population of Sitka, Alaska, the location of the former Alaska Pulp mill, has declined by 4 percent and salary and by 1998, inflation-adjusted payroll and employment is 15 percent lower than pre-closure. (*See*, Appendix 2, “Economics of Declining Timber Harvests,” February 2000, prepared by the McDowell Group, pages ii-iii).

damages after the termination, APC sued the United States, and the United States Court of Claims recently made a very rare judicial determination:⁵ it granted APC's cross-motion for summary judgment on the linchpin issue of liability and ruled that the *government had no basis to terminate the contract because the company was not required to operate the pulp mill in Sitka, Alaska.*⁶ This decision was made by reading the clear words of the contract. The Court did not even reach the issue of whether the decision to terminate was properly undertaken or executed by the government through the government's contracting officer according to the terms of the contract and the Contract Disputes Act of 1978 (CDA)⁷. Only two basic issues remain at this juncture: (1) did prior unilateral actions that modified the contract based on statutory direction under the Tongass Timber Reform Act⁸ constitute an *even earlier* breach of the contract on February 27, 1991, when the Act's contract modifications were implemented, and (2) flowing from whatever the breach date, what is the exact amount that the United States will pay APC in damages.

While Alaska's elected leaders urged that the federal government officials fulfill obligations of

⁵ See, Appendix 3, According to the Clerk of the Court of Claims only in rare instances are summary judgments granted on contract cases. Additionally, judgments for plaintiffs and petitioners in FY 1997 only totaled \$757 million, in FY 98 only totaled \$1.7 billion, and in FY 99 only totaled \$1.8 billion. If, on the issue of damages, the Court determines damages to be even close to the \$1.6 billion figure asserted by Alaska Pulp Corporation, it will dwarf the total yearly historical dollar awards.

⁶ Appendix 4, Court of Claims opinion and order entering summary judgment, United States Court of Federal Claims, No. 95-153C (May 25, 2000).

⁷Contract Disputes Act of 1978, P.L. 95-563, 92 Stat. 2383-91, 41 U.S.C. §§ 601-613 (1988).

⁸ Section 301 of the Tongass Timber Reform Act (104 Stat. 4430, P.L. 101-626) directed nine unilateral modifications to terms of Alaska Pulp Corporation's long-term contract. (Appendix 5).

the United States under the contract,⁹ the Clinton-Gore Administration chose the opposite course, exactly as urged by special-interest environmental groups.¹⁰ The action by the federal government to terminate the contract was taken without meaningful analysis by the true decision-makers of whether and to what extent the United States could or would be exposed to liability and damages for breach of contract. The exercise of unfolding the decision to determine who actually made the decision to terminate and who would take the responsibility is much like the old “Who’s On First” comedy routine—with every politically appointed decision-maker pointing to someone else or a “group” as a whole.

If malpractice applied to the government decision-making, the decision to cancel APC’s contract would be decisional malpractice of the highest order. These facts are clear: there was a contract; the CDA applied to the contract; there was a decision to terminate the contract; the decision to terminate the contract was not made by the contracting officer as it should have been under the CDA. If the CDA had been followed and the designated contracting officer had made the decision on the APC contract issue, then the contract would have been extended for at least six months, and in all likelihood the conversion of the mill would have occurred. The huge money damage claim against the

⁹ These elected leaders included Alaska’s member of the United States House, its’ two United States Senators, its Governor, and a majority of both houses of the Alaska State Legislature. Attached in Appendix 6 are February 1994 letters from The Honorable Don Young to the USDA, The Honorable Frank Murkowski, and The Honorable Ted Stevens to the Forest Service contracting officer urging that the Forest Service allow the conversion of the mill to go forward and that the contract not be terminated.

¹⁰ Appendix 7, November 16, 1993, “legal” memorandum submitted by environmental groups attempting to justify a government termination of the Alaska Pulp Corporation contract and other evidence of urging by such groups.

government would have been avoided and the legions of government lawyers who worked on this case could have worked on something else.

Under the CDA, decisions about federal contracts should be made by a designated “contracting officer” and the contracting officer must be clearly identified.¹¹ Neither occurred concerning the APC contract decision, which makes the decision even more indefensible. *Everyone* from the designated contracting officer (the Regional Forester) to the Secretary of Agriculture denies or does not recall making the decision to terminate the APC contract. The records examined in this oversight review also indicate that a cast of at least six political appointees in the Department of Agriculture and U.S. Forest Service influenced or perhaps made the decision to terminate. If there was an individual who actually made the decision, he or she did not claim the decision and take responsibility. Instead the contracting officer, the Regional Forester, whose analysis and documentation pointed to the *opposite* decision (a six month extension), was directly overruled and ordered by his superior, the Chief of the Forest Service, to sign a decision letter that was not the product of his judgment.

The Chief, though, claims he did not make the decision, but he was pleased with the decision because his view was that the forest plan revision, which would not emerge for another five years, would not support timber harvest levels required in the contract. The Assistant Secretary claims he did not make the decision, but his boss the Secretary made the decision to terminate after one short

¹¹ For final contract decisions it is “generally assumed that discretion must be exercised by the contracting officer issuing the termination.” *Administration of Government Contracts*, John Cibinic, Jr. and Ralph C. Nash, Jr. (3d ed.) 979-981, (Appendix 8) and *Fairfield Scientific Corp. v. United States* 222 Ct. Cl 167, 611 F.2d 854 (1979).

meeting that no one else remembers subsequent to a meeting with Alaska's Senators. At that meeting with the Senators, the Secretary chose to approve a six month extension according to Thomas' journal entry.¹² The Assistant Secretary recalled almost no specifics about the basis for \$750,000,000 decision, but he nonetheless made a "recommendation" to the Secretary and to two superiors at the White House to terminate. He pins the decision to terminate on the Secretary, but the Secretary and his counsel have not verified that claim. The White House staff at OMB, who were heavily lobbied by environmentalist special interest groups to direct the termination of the contract, can only repeat their desire to seek the "proper process," the "right procedure," and that we "did things right." All such supervision did nothing to ensure proper process and procedure, and it created a highly irregular decision-making scenario that was unfair to the company and in no way ensured the government's decision was solid on the merits or backed up with a solid legal authority and analysis.

While this decision to terminate may have been "cheap" for the Clinton-Gore Administration, it was a dishonor to the word of the United States. It was devastating for the people of Sitka and Southeast Alaska who lost their family wage jobs. It did not comply with even the simplest notions of fairness and proper procedure. It was based on dishonest and misleading written representations of senior government officials. It was based on shoddy to non-existent legal renderings by Department of Justice lawyers, rather than a justified, legally sound position. This decision will very likely be extremely costly to the taxpayers.

¹² Appendix 9, Journal of Jack Ward Thomas, Chief, USFS, entries on December 17, 1993, March 16, 1994, March 22, 1994, April 10, 1994, April 12, 1994, April 13, 1994, and January 3, 1993.

None of the records reviewed reveal that any of that cast above the contracting officer Barton were or became the APC contracting officer who under the CDA, is to exercise judgment and make decisions regarding the federal contract. The record also reveals that APC was *never* notified that anyone other than Regional Forester Barton was the contracting officer whose judgment would render a decision on the APC contract matter. To the contrary, the company was told by the Assistant Secretary that the contracting officer would be *making* the decision “in consultation with his superiors,” which was, at a minimum, a purposefully misleading representation by the government. In the ordinary course, this flaw could be very harmful to the federal decision, but the Court of Claims did not even need to reach the issues regarding the termination decision. The Court dispensed with the absurdity of the government’s excuse for canceling the contract on much more straightforward contract grounds.

The Court based its decision on an analysis that any first year law student who completed a contracts course with a “C” or better grade could understand, but the Department of Justice lawyers litigating this case and the lawyers advising the government to breach the contract apparently have difficulty understanding. It is difficult to even evaluate the basis of their legal position prior to the decision, because there was no written legal opinion or analysis backed up by case law, citation, or legal treatise supporting the government’s position, a position that the Court of Claims found decisively lacking. Summarized, the Court’s analysis is that a party to a contract, including the government, cannot impose material obligations under a contract based on words that do not appear in the contract. Stated differently, the government lawyers and decision-makers attempted to change the 37 year old contract by imagining a word into the contract that did not appear in the contract. Then the government accused APC of failing to perform “obligations” created by the word that the government imagined into

the contract. Stated more plainly, the government welched on its side of the deal and then tried to accuse APC of breaking the contract.

The remaining problem, and the reason for this oversight review and report, is that when a government decision without a maker results in a liability that could easily reach *three-quarters of a billion or 25 percent of the Forest Service budget*, individuals who made the decision and subjected the taxpayers to this significant liability should be held accountable. In addition, knowing the details of how this liability was created, the Committee can evaluate modifications of law so this exposure never occurs again—on the Tongass National Forest or in any of the 120 National Forest units.

II. Oversight Review Summary

The Committee on Resources has legislated on all aspects of the Tongass, including the land designations and the APC contract that was first unilaterally changed by the Tongass Timber Reform Act and then terminated outright by the Clinton-Gore Administration. The Committee has jurisdiction over Forest Service management and administration of the Tongass National Forest, which is public domain land. The Committee also has a responsibility under Rule X(l) and Rule XI of the Rules of the House of Representatives to oversee Department of Agriculture and Forest Service decision-making concerning the Tongass, and to review on a continuing basis laws, policies, and practices of the Forest Service.

To execute these responsibilities with respect to the \$750,000,000 contract breach by the government, the Committee on Resources undertook an oversight review of the decision to terminate the long-term timber sale contract between the United States and APC. This action was initiated by a letter from Chairman Young to Secretary Glickman and to Ms. Kathleen McGinty of the Council on

Environmental Quality (CEQ), on February 24, 1998.¹³

The oversight review required the production of records related to the APC contract termination decision, but the production deadline was missed by the Secretary, and while CEQ responded by the March 16, 1998, deadline, no meaningful records were produced by the CEQ¹⁴. On April 24, 1998, the Chairman wrote to the Secretary reminding him that production was delinquent, and the Secretary produced some responsive records on May 4, 1998.¹⁵ Secretary Glickman, however, refused to provide records over which “privileges” to shield the document from production may apply in litigation between the United States and APC. The Department also could not provide certain records that were in the office of former Secretary Espy, because they were in the possession of an independent counsel investigating unrelated matters with the available records held by the Committee.

The Department advised the Committee of both positions in a May 11, 1998, letter from James P. Perry, Associate General Counsel, USDA, to Committee staff.¹⁶ Attachment 4 to that letter contained the list of records “on which the government has asserted privilege against plaintiff in the APC litigation,” and these records were not provided to the Committee by the Department. Mr. Perry asked

¹³Appendix 10, February 24, 1998, letter from Chairman Young to Kathleen McGinty.

¹⁴Appendix 11, March 16, 1998, letter from Kathleen McGinty to Chairman Young.

¹⁵ Appendix 12, April 24, 1998, letter from Chairman Young to Secretary Glickman.

¹⁶Appendix 13, May 11, 1998, letter from James P. Perry to Duane Gibson, General Counsel, Oversight and Investigations, Committee on Resources (with attachment 4 only).

that any “requests for documents relating to the litigation be made directly to the Attorney General.”¹⁷

Because all of the records could not be obtained, because they were in use by the independent counsel, and because the matter is in the early stage of litigation, the Chairman *elected* to temporarily stay his request for the independent counsel records and other litigation records. Staff work on the oversight review continued using the available records held by the Committee.

On February 24, 1999, after the Espy independent counsel completed its work, Chairman Young renewed his request to the Secretary for the responsive records returned to the Department by the independent counsel.¹⁸ The Secretary refused to provide the records because the Department of Justice then had possession of them, and in the view of the Department, the Committee’s record request was contingent on completion of the discovery process in the APC litigation. This was unacceptable, and as a result of the impasse and the long delay in production of essential records by the USDA and DOJ, the Chairman wrote to General Janet Reno on April 1, 1999, demanding the same records requested from the Secretary, specifically the independent counsel records and those itemized on “ATTACHMENT 4” of the Perry letter.¹⁹ Dennis Burke, Acting Assistant Attorney General, replied to Chairman Young on April 8, 1999, raising “serious concerns” over the impact of the Chairman’s request on the discovery process in the APC litigation, and DOJ did not comply with the

¹⁷ Id.

¹⁸ Appendix 14, February 24, 1999, letter from Chairman Young to Secretary Glickman.

¹⁹ Appendix 15, April 1, 1999, letter from Chairman Young to General Reno.

Chairman's request to produce the records.²⁰

As a result, the Chairman sought and received the authority from the Committee to issue subpoenas in connection with the oversight review on April 28, 1999.²¹ The Chairman issued subpoenas for the records that were priorly requested from the Secretary and Attorney General Reno on May 2, 1999.²² In the mean time, the Department of Justice again refused to produce the records that were subject to discovery disagreements in the APC litigation and also refused to produce records that it contended were "privileged" in the APC litigation.²³ The Department of Justice offered access to and review of a small subset of requested records, provided that the Chairman agreed to maintain confidentiality of the records. In other words, the Department would allow access to information that could then not be used. The Chairman rejected this offer, electing to proceed with subpoenaing the records needed for the oversight review.

The Department of Justice did not produce the subpoenaed records, and at the request of Attorney General Reno, the Chairman agreed to meet with her to discuss the matter. The meeting occurred on May 13, 1999, and the result is described in a May 14, 1999, letter from Chairman Young

²⁰ Appendix 16, April 8, 1999, letter from Acting Assistant Attorney General, Dennis K. Burke, to Chairman Young.

²¹ Appendix 17, April 27, 1999, memo outlining the lack of legal authority of the USDA to refuse requests for records and an April 26, 1999, memorandum to Members of the Committee on Resources from Committee Staff describing the need for subpoena authority.

²² Appendix 18, Subpoenas to The Honorable Janet Reno and the Honorable Dan Glickman.

²³ Appendix 19, April 27, 1999, letter from Jon P. Jennings, Acting Assistant Attorney General to The Honorable Don Young.

to General Reno.²⁴ Essentially, the Department agreed to provide the subpoenaed records and the Chairman agreed to keep certain litigation material secured. However, the Department reneged on the arrangement, instead providing only the ATTACHMENT 4 records and withholding the litigation records.²⁵ The understanding of the Chairman and the Department are described in an exchange of letters that are included in an appendix to this report.²⁶

Finally, on December 1, 1999, the Chairman requested copies of several depositions in the APC litigation,²⁷ because they were expected to yield information concerning issues important to the Committee's oversight review: facts about the decision to terminate the APC contract. The depositions were provided by the Department on December 8, 1999, and December 14, 1999.²⁸

Although the USDA and DOJ failed to fully comply with the Committee's request, the records support the conclusion that the contract termination decision was a politically motivated action to achieve numerous objectives urged and desired by special interest groups that lobbied the White House and Assistant Secretary Lyons. Those objectives included facilitating reduction of the land base available in the pending land plan revision for timber harvesting in the Tongass. A driving force of this

²⁴ Appendix 20, May 14, 1999, letter from Chairman Young to Attorney General Reno and attached letter to Robert Van Kirk.

²⁵ Appendix 21, 1999, letter from Attorney General Reno to Chairman Young; June 3, 1999, letter from Chairman Young to General Reno; and July 19, 1999, letter from Jon P. Jennings, Acting Assistant Attorney General to Chairman Young.

²⁶ Id.

²⁷ Appendix 22, December 1, 1999, letter from Chairman Young to General Reno.

²⁸ Appendix 23, December 8, 1999, letter from Robert Raben, Assistant Attorney General to Chairman Don Young.

decision was a belief that the goal of lowering the maximum timber level in the Tongass Land Management Plan revision could not be achieved with the existence of the long-term APC contract.

III. The APC Contract: A Long-term Commitment of the United States

A. The Contract Disputes Act And The Alaska Pulp Corporation Contract

By a mutual modification of the APC contract well before the termination, it was agreed that the contract would be governed by the provisions of the Contract Disputes Act (CDA) of 1978.²⁹ Thus, the role and judgment of Regional Forester, Michael A. Barton, about all matters regarding the APC contract was very important for proper contract administration. The stated purpose of the statute is to “provide a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving contract claims.”³⁰

The goal of the CDA is to isolate the disagreement or claim and resolve it at the lowest possible level—the contracting officer.³¹ While flexibility in the role of the contracting officer is permitted, it cannot be exploited to the detriment of the contractor, which is why Congress required the contracting officer to be clearly identified. The Senate Report explained:

²⁹ Contract Disputes Act of 1978, P.L. 95-563, 92 Stat. 2383-91 (codified at 41 U.S.C. §§601-613 (1988)).

³⁰ See, Senate Committee on Government Affairs and Senate Committee on Judiciary Joint Report, Contract Disputes Act of 1978, S. Rep. No. 118, 95th Cong., 2nd Sess. 1. The legislation addressed the problem of the unplanned and uncoordinated nature of resolving contract disputes toward the end of eliminating the effects that such disorder had on the willingness of contractors to do business with the Federal government. *Id.* at 3. The Act largely implements the recommendations of the Commission on Government Procurement in 1969, thirteen of which concerned handling contract claims.

³¹ See, “Contractor Assertion of Claims Under the Contract Disputes Act,” 133 Mil. L. Rev. 141 (1991).

Thus, in the disputes and remedies area, the procuring agencies should have flexibility deciding what role the contracting officer will have. Most importantly, the agencies, whatever role they decide to give the contracting officer, must make clear that role to the contractor. Thus, if for one reason or another, the contracting officer is not the primary decision maker on a contract matter, the Government must tell the contractor this, and tell the contractor who is making the decision. From the course of action the contractor will at all times know with whom he is dealing with in matters under dispute.³²

Placing decision-making authority about contract claims in one person—the contracting officer—largely resolved the problem of the uncoordinated nature of federal contract decision-making, because it gives the contractor *an individual* to deal with, instead of a nameless, faceless bureaucracy. The CDA also has the effect of taking the decision out of the political realm, unless the agency changes the contracting officer to a political appointee, and the contractor is clearly notified of the change. The records produced for this oversight review show that the APC contract dispute and termination was not resolved as the CDA contemplates.

Decisions about a dispute under a federal contract governed by the CDA should be made *by the contracting officer* designated for the particular contract. The *exercise of independent judgment whether by the contracting officer or someone else with authority to do so* validates that the decision was not arbitrary. Thus, a contracting officer can consult with others, *then* exercise his judgment and make the decision about the dispute.³³ A contracting officer can obtain legal advice and opinions, and then “put his own mind to the problems and render his own decisions” to decide a

³² Senate Report at 21-22.

³³ See, *Nuclear Research Corp. v. United States*, 814 F.2d 647, 649-50 (Fed Cir. 1987).

contract dispute.³⁴ A contracting officer can even seek advice from subordinates and then decide how to handle the contract dispute independently.³⁵ If a person other than the contracting officer makes contract decisions, someone with authority must exercise judgment on the merits of the contract issue.³⁶ Barton was advised of the basic aspects of his contracting officer duties in early January 1994, but his superiors overrode his decisions³⁷ without examining the merits of the contract issue or the merits of APC's proposal.

However, if a contracting officer is forced by political factors to render a particular decision by political pressure, then the decision is not in conformance with the CDA. Beginning in January 1994, the contracting officer exercised less and less judgment about the termination decision, and the merits of the issue were not addressed by the contracting officer's superiors. In the end, when the government stopped performing under the contract on April 14, 1994, thereby breaching it, the contracting officer's judgment based on the merits was to make a six month extension to allow time for the feasibility study of the MDF plant. This was not the decision the contracting officer was ordered by his boss to sign,

³⁴ See, *Pacific Architects and Engineers, Inc. v. United States*, 491 F. 2d 734, 744 (Ct. Cl. 1974).

³⁵ See, *J.A. Terteling & Sons, Inc. v. United States*, 390 F.2d 926, 927 (Ct. Cl. 1968).

³⁶ See, Cibinic, note 11, at page 979, "*Fairchild Scientific* appears to assume that a contracting officer is required to make the decision to terminate. This question has not been authoritatively decided. One decision has held that the decision to terminate for default need not be a "personal decision" of the contracting officer so long as there was not a complete abdication of discretion, *Square Constr. Co. & LaFera Contracting Co.* ENGBCA 3494, 76-1 BCA paragraph 111,747."

³⁷ Appendix 24, January 11, 1994, fax to Mike Barton from Office of General Counsel, USDA Portland, Oregon.

and the factors that led him to that conclusion were not considered by the cast of would-be decision-makers. While he did undertake the *pro forma* role of signing the termination letter, the records reviewed unequivocally show that the contracting officer was instructed to terminate the contract.

While not centrally relevant to APC's lawsuit against the United States, determining who made the decision to terminate the APC contract and to thereby create a \$750,000,000 liability for contract breach damages is important for purposes this Congressional oversight to prevent the same type of expensive decision in the future. It is also important to examine the diminishing role of the contracting officer in this contract dispute, how those who directed decision-making about the APC contract did not consider the merits of the APC case or the high risk of exposure to contract breach damages, and how those decision-makers tried to hide behind the contracting officer to deliberately obscure who the true decision-makers were.

B. The Seeds Of A Dispute: The Tongass Timber Reform Act

The United States agreed to supply timber to APC under a 50 year contract beginning in 1957. In exchange, the company agreed to install a pulp mill in Sitka, Alaska at a cost exceeding \$60 million and to purchase logs harvested from the Tongass National Forest.³⁸ The contract and all relevant terms (schedule, pricing, logging terms, etc.) endured until 1990,³⁹ when section 301 of the Tongass Timber Reform Act directed nine unilateral changes to the contract, changes that were made without APC's

³⁸ Appendix 25, April 1994 Fact Sheet "Available Forest Land on Tongass N.F." prepared by U.S. Forest Service.

³⁹ The contract was, however, modified several times by mutual agreement.

consent.⁴⁰ According to the company, this rendered APC's continued operation under the contract uneconomic. The changes were material, and the company sued the federal government over the validity of the unilateral terms added to its contract.⁴¹ While that dispute was being litigated, the events leading the government to terminate the APC contract were set in motion.

Those events began on May 3, 1993, when APC wrote to the Regional Forester, Mike Barton who was the designated contracting officer for the APC contract. The company informed him that because of the poor dissolving pulp market, the company was considering six different options involving pulp logs processed at its mills, one of which (option six) was to use pulp logs in a process to make a product other than dissolving pulp.⁴² The company asked for Barton's reaction to the options. Barton replied on May 20, 1993,⁴³ stating that the use of pulp logs to make a product other than pulp was "welcome" if it was in addition to operation of the pulp mill. Barton stated:

Option 6 would certainly be welcome if it were in addition to the operation of the pulp mill. However, proposing Option 6, or any other option, in lieu of operation of the mill would be of serious concern and would constitute a material breach of the contract. . . . Alaska Pulp Corporation agreed to construct and operate a pulp mill with certain volume requirements . . . subject only to the provision of B0.5 regarding temporary shutdowns.

⁴⁰ P.L. 101-626, 104 Stat 4430. *See*, Appendix 5.

⁴¹ *Alaska Pulp Corporation v. United States*, USDC District of Alaska, Case No. J93-010.

⁴² Appendix 26, May 3, 1993, letter from George Woodbury, Vice President/Timber Operations to Mike Barton.

⁴³ Appendix 27, May 20, 1993, letter from Michael A. Barton, to George Woodbury, Alaska Pulp Corporation, plus attachment. The distinction between pulp and saw logs is a matter of quality. Pulp logs are generally of lower quality and because of rot, decay, and other defects cannot easily or economically be used to make lumber in sawmill operations. For an integrated economically viable operation in the Tongass, there must be a use for pulp and saw logs.

This position that APC must *operate* the mill dealt only with a hypothetical set of facts and would soften through late September 1993 as the company's plans narrowed to a medium density fiberboard (MDF) plant, and Barton received guidance from his advisors as to exactly what would qualify as a "pulp mill" under the contract. The softening also took into account the contractual exposure of the government as it became known to the contracting officer at the regional level. Although the contracting officer did not abandon the contention that the contract required operation of a pulp mill, he did not assert it until 86 days after actually being notified of the company's intention to proceed with an indefinite shutdown of the Sitka mill and six days prior to the actual shutdown. However, Barton also recognized in the May 20 letter that the APC sawmill facility in Wrangell was by definition the "pulp mill" under the contract, so its profitability would be considered in evaluating whether a temporary shutdown (and contract extension) under the contract was warranted.

IV. Mill Closure and Contracting Officer Response

A. Contracting Officer In Control

On June 30, 1993, APC notified the Forest Service that it intended to "indefinitely suspend pulp mill operations" on September 30, 1993.⁴⁴ The company invoked the *force majeure* clause of its contract (Section 5a2) as justification for the suspension because of "abnormal causes beyond its control,"⁴⁵ and indicated it may seek an extension of the term of the contract under that clause. APC

⁴⁴ Appendix 28, June 30, 1993 letter from Frank Roppel to Mike Barton. The company had priorly written to Regional Forester Barton asking for a reaction to six options about the future of the pulp mill. The Forest Service position was that "any . . . option in lieu of operation of the mill . . . would constitute a material breach of the contract.

⁴⁵ Those abnormal causes were impact of the Forest Service's administration of the contract under the 1990 TTRA unilateral changes and pulp market conditions.

also announced that it was exploring the option to convert the pulp mill for manufacture of MDF, a product composed using the same raw material through a different pulping process, and an additional stage of manufacturing.

The Forest Service contracting officer's response was bifurcated. One response on the economic dislocation and possible mill conversion issues was issued the day following APC's notification, July 1, 1993. The other response on the contract issues would not be sent until nearly three months later, on September 24, 1993.

In the July response, Regional Forester Barton wrote to APC expressing concern about adverse economic impacts of the decision on the Southeast Alaska economy and offering to discuss how to minimize the negative impact by examining projections for future market demands for "other products." The approach was facilitative and assistance-oriented regarding conversion of the plant. The service took action to assist the company in its evaluation of raw materials from the Tongass for use in MDF production. By August 24, 1993, the Forest Service and APC had assembled a team of people to undertake several aspects of collecting the information to make the MDF conversion (or an alternative conversion) a reality.⁴⁶ Together with the State of Alaska and the Forest Service, the company launched a complete MDF literature search, gathered statistics for a market study, collected, shipped, and tested sample raw material from the Tongass (which was done at the Forest Service Forest Products Lab), manufactured of sample boards, evaluated additional value added processing from MDF components, and evaluated alternative products. By September 3, 1993, much information

⁴⁶ Appendix 29, minutes of a August 24, 1993, conference call detailing Forest Service and APC action plan to facilitate a viable conversion.

on economic and technical feasibility was accumulated, and it strongly supported conversion of the current dissolving pulp process to an MDF pulping process.⁴⁷

This supportive and interactive process between the Region 10 of the Forest Service and APC ensued for approximately four months when a November 5, 1993, white paper developed by the Forest Service team concluded some extraordinarily positive prospects about the proposed conversion⁴⁸:

- (1) **MDF was an excellent option and had the best chance to succeed:** “After looking into a number of options . . . it appears that medium density fiberboard (MDF) offers the most potential.”
- (2) **The revenues for the Forest Service would increase if an MDF plant were constructed:** “Stumpage prices will increase along with product values.”
- (3) **The MDF plant was economically viable:** “The analysis indicates that a ‘stand alone’ MDF plant is economically viable, thereby adding to the profitability of the integrated facility.”
- (4) **The MDF plant eliminates almost all pollution:** “The MDF production virtually eliminates the water quality issues that surround pulp manufacture.”

Most strikingly, the analysis concluded that the APC contract would provide enough raw material for a

⁴⁷ Appendix 30, information indicating positive preliminary market and product feasibility in a September 3, 1993, and September 10, 1993, communications of the team, with attachment.

⁴⁸ Appendix 31, “white paper” identified by a handwritten “K. Morse”, probably Kathleen Morse who was a senior member of the Forest Service team assisting with the evaluation. All quotes that follow in text the top of page 21 are from this white paper.

larger scale plant and that such a plant would be profitable, even operating at half of its capacity:

The long-term contract volume provides an ample supply of raw material for operations of the larger plant design (120,000 MSF annual production). Preliminary analyses indicate that there are significant economies of scale with the larger operation (vs 65,000 [sic] Msf design). The break-even f.o.b. price at capacity for the larger plant is estimated at \$383/Msf, well within current selling values on the export market. Furthermore, given the mid-range price forecast described above, the plant has the potential to cover both fixed and variable costs while operating at less than 50% capacity.

Therefore, the Forest Service and contracting officer were fully aware that plant was conceptually feasible, that the full APC contract volume made an MDF plant the most economic, and that there were substantial environmental benefits to be achieved with the MDF conversion.

During the time the cooperative feasibility work was undertaken, the Regional Forester and his advisors analyzed the contractual situation. The first draft of the analysis appeared in a July 1, 1993, transmission from Bob Maynard, an attorney with the Office of General Counsel assigned to Region 10 in Juneau, Alaska to Mike Barton, and was “preliminary, informal advice regarding interpretation of this section [BO.5 (Mill Shutdowns)] of the contract in relation to the shutdown of pulp mill operations.”⁴⁹ It was clear from this and several revised analyses that the contracting officer understood that the APC contract did not directly contemplate the situation where the company would “indefinitely” suspend pulp mill operations, continue associated facility sawmill operations, and continue to harvest trees from units of the forest that had been released. The contract clearly required *installation* of “a mill or mills for the manufacture of pulp . . . with such additional associated

⁴⁹ Appendix 32, contract analysis transmission. This was identified as Document 45 produced by the Department of Justice, which claimed an unspecified privilege over its production.

facilities,’⁵⁰ but importantly Maynard observed at this early stage that it was only by “implication” that operation of the mill was “one of the basic obligations” of APC under the contract.⁵¹

The meaning of this observation is staggering. The whole basis of the government’s future case—and a check that could amount to \$750,000,000 from the taxpayers—rested in a word that does not appear in the contract and was only implied. It is an acknowledgment that the government advisor closest to the region, closest to the contract, and relied on by the contracting officer actually understood that operation of the mill was not directly required by the words of the contract. Given this understanding, which was to the detriment of the government’s prior position that continuous operation *was required, not a single written legal analysis on this issue was produced by any government lawyer prior to the eventual termination of the contract, even though this would be the linchpin basis of the government’s termination of the contract.*

In addition, under the terms of the contract, “additional associated facilities” is clearly defined to be and referred as a part of the pulp mill, which created another problem for the Forest Service because the APC’s Wrangell sawmill (an associated facility) was still operating. So technically the pulp mill was operating, and in Maynard’s words, “As recently as your [Mike Barton’s] letter to APC, the Forest Service has therefore interpreted the ‘pulp mill’ used in section B0.5 and other sections of the contract to include the Wrangell sawmill.” The Forest Service was clearly vulnerable, because APC was complying with the contract by operating the Wrangell sawmill, an “associated facility,” thus “the pulp mill” under the contract.

⁵⁰ Appendix 32-A, APC contract provision B0.11.

⁵¹ Appendix 32 [DOC 45 -002 0001] (see note 49)

The analysis also explained other relevant terms of the contract. Notably, the contract clearly contemplated the contingency that the pulp mill would be “shutdown,” and in the case where a shutdown is for three months or more and for “causes” beyond the control of APC,⁵² the company was eligible to actually extend the term of the contract. This was the posture that APC took when it invoked *force majeure* under the terms of its contract. However, on the question of whether application of *force majeure* was proper, Maynard observed that the justification for an extension of the contract term may not be sufficient because the Wrangell sawmill was still operating. To make the determination of whether an extension could be granted, the Forest Service would need to know the profits and losses of both parts of APC’s operation.

The Maynard analysis for Barton was rewritten numerous times, and it morphed from a informal advice about contract term analysis to a full blown detailed options paper in question and answer format over the ensuing months. The importance of the Maynard analysis is that it is the *first* written rendering received by Barton when he issued his July 1, 1993, letter to Roppel, and it explains (1) why Barton adopted a posture of providing assistance to the company in its stated desire to convert the plant and (2) why Barton did not produce a legalistic response asserting the position that the duty to operate the pulp mill from words that were not in the contract was somehow material or overriding. Instead, Barton did what was rational. He provided assistance, tried to salvage a situation that was created in part by an Act of Congress, in part by bad economics, and in part by an older mill. This

⁵² Causes including circumstances that would not allow operation of the mill at or above the break-even point, acts of the government, or adverse domestic economic conditions qualify as valid reasons to extend the term of the contract, if the contracting officer determines that any of the criteria are met.

approach was sensitive to the communities that relied on timber processing for substantial employment base, and to the interests of the Forest Service that would enjoy a much better return in stumpage associated with MDF pulp mill operation. The Forest Service had several contractual weaknesses and a facilitative approach may not only have avoid potential contractual fights for the government, but reopening a converted mill would have eliminated the economic and social distress of Sitka. It was not until late September 1993, after other factors had influenced Barton and the actual closure of the mill was only days away, that the legalistic response was sent to APC.

The next rendering of the Maynard white paper was done in conjunction with Barton and completed on August 30, 1993.⁵³ It addressed the important questions and analysis that are paraphrased below:

(1) How long can the pulp mill be shut down before contract breach occurs?

Answer (page 3):

somewhere between 3 months and 5 years. After 3 months APC can ask for a contract extension if certain conditions are met. . . . If the pulp mill is not used for processing timber for five consecutive years the land it is situated on reverts to the United States. This indicates that the non-operation of the pulp mill for five consecutive years is the maximum the government would allow an extension of time.

(2) What are the criteria to be met for an alternate facility in lieu of a pulp mill that will meet the contract definition of a pulp mill?

Answer (page 4-5): The answer comes from certain industry definitions. Those definitions include

PULP MILL—an industrial plant manufacturing pulp from wood (wood pulp).

⁵³ Appendix 33, “APC White Paper, 8/93,” with Maynard comments in bold on 8-30-93.

WOOD PULP—Wood fibers separated by mechanical or chemical means for use in manufacturing paper, textiles, and many other products derived from cellulose.

FIBERBOARD—Sheet material manufactured under pressure and heat from fibers of any wood substance.

The one main criteria to be met if an alternative product is produced is that it must be a product made from wood fibers that have been separated. This product would then meet the definitions above for wood pulp and pulp mill.

(3) Analysis of the Situation (page 8)

Based on the above two paragraphs, one can draw the conclusion that it is market price for dissolving pulp and pulp manufacturing costs that have lead APC to close the pulp mill. It is apparently still profitable to process the higher grade logs through their sawmill and sell their pulp logs to KPC. . . . When you read Section B0.5 you get the impression that the framers did not envision a scenario where the pulp mill suspends operations and logging operations continue.

(4) Recommendations (page 9)

Regional Forester control of the APC contract decision-making in late September is also indicated by the recommendation and Maynard comments in the August 30, 1993, APC white paper:

After the September 30 suspension of operations, APC indicated in their 6/30/93 letter to RF [Regional Forester] that they would be requesting contract extension time. When this request is made, the FS should request APC to provide financial data that can be verified and released to the public that would justify the contract extension.⁵⁴

Thus, Barton's plan was to require the needed information—aggregate profitability of the pulp and sawmill parts of APC's operation—for a decision on extending the term of the contract. Maynard's suggestion was to make the request earlier to determine whether the company may have breached the contract:

⁵⁴ Id.

I suggest we request it [financial data] before then or immediately after the mill shutdown to determine whether they will be in breach of the contract by continuing to keep the mill shut down [sic]; don't tie the request/demand to just the extension question.⁵⁵

The question of breach was still an open question for Barton and his advisors, and the action Barton eventually took, the September 24, 1993, letter left that question open. While Barton appeared to be in control of APC decision-making as the contracting officer at that juncture, other factors also began having an impact on APC contract decision-making.⁵⁶

B. Contracting Officer Control Threatened: "Green" Groups Lobby White House To Terminate Contract

While Barton's cooperative approach with APC in the context of the government's less than solid contractual position was reasonable, the national and local environmental groups began to engage at political levels to force cancellation of the APC contract. Environmentalist groups had urged cancellation and lost that political fight when Congress rejected the option of canceling the two Tongass long-term timber contracts in 1990. The environmentalist tactic that urged cancellation was familiar: threaten and get political no matter the cost.

The opening volley was from Chuck Clusen, of the Natural Resources Defense Council, who sent a memo on August 5, 1993,⁵⁷ to Ali Webb, who forwarded it to Jim Lyons, the Assistant Secretary, the political appointee second in rank to the Secretary of Agriculture who oversees the Forest Service. The memo made an implied political threat: "USDA's lack of attention to Alaska issues

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Appendix 34, August 5, 1993, Memo from Chuck Clusen to Ali Webb.

is resulting in serious damage and will, if not remedied, lead in the near future to some embarrassing blow-ups for the Clinton Administration.” Translated: the Department better gain control of Alaska issues and do what we want done—in this case cancel the contract--or it will hurt the Clinton Administration. Then Clusen attacked the regional office handling of the APC contract situation.

The pulp company is trying to seek relief from an uneconomical pulp market by attempting to get its contract revised. It has sympathetic ears in the USFS regional office and the Alaska congressional delegation. The message needs to come from Washington that if the pulp mill can no longer operate as required by the contract, then the contract must be terminated. This is a chance to regain control of Tongass management.

Ali Webb’s handwritten note to Jim Lyons on the memo said “Jim, FYI! We greens need to stick together! Ali.” The clear instruction from the NRDC was that Jim Lyons was considered a “green” or an environmentalist, that Jim Lyons needed to engage on the APC contract issue, that the Regional Forester was not making the right decisions for termination of the contract, and that “terminating” the contract would avoid a political blow-up for the Clinton Administration. As indicated by the Undersecretary’s phone log, the NRDC memo was prefaced by a call on July 29, 1993, from Mr. Bart Koehler, the former head of SEACC, an umbrella group for environmentalist organizations in the Tongass. Koehler’s message was that he wanted to speak to Lyons about the “Sitka Pulp Mill.”⁵⁸

That message having been sent and received, another environmental group delivered the same message—terminate the APC contract—to the White House through the Office of Management and Budget. On September 9, 1993, the Alaska Rainforest Campaign through Nicholas Lapham of the

⁵⁸ Appendix 35, Assistant Secretary James R. Lyons phone log, “Important Phone Calls to Make.”

NRDC, sent a memo to OMB Director Alice Rivlin.⁵⁹ The memo notes a meeting with Mr. Ron Cogswell of OMB set for Tuesday, September 14, 1993, and expresses disappointment that Ms. Rivlin's deputy Mr. T.J. Glauthier could not attend the meeting. Two days after the meeting, which included Mr. Clusen, the author of the NRDC memo passed to Undersecretary Lyons, Mr. Cogswell and Mr. Mark Weatherly approved a memo from another OMB staffer, Ms. Ruth Saunders that acknowledged the September 14, 1993, meeting and factually summarized the status of the APC contract situation⁶⁰:

One of the long term contract holders on the Tongass will shutdown its pulp mill beginning on October 1st; the shutdown may be permanent. This action is expected to put 400 people out of work in the town of Sitka (estimates go as high as 1000 jobs lost). The Southeast Alaska Conservation Council (SEACC) [a member of the Alaska Rainforest Campaign that set the September 14 meeting] contends that this closure violates the Government's contract with the mill, which dates back to the mid-1950s.

* * *

The Forest Service has advised the APC that it must continue to utilize its pulp mill to be in compliance with the long-term contract. The company may be planning a temporary closure to retool the plant to comply with EPA's air quality standards. The main reason for the shutdown is low world pulp demand and market prices that have not allowed the mill to cover its costs.

* * *

The question surrounding the closure of the APC mill is being investigated by the Forest Service for compliance with the terms of the contract. **The Forest Service is planning to notify the company that if it does not reopen the mill, it may be in violation of the contract.** In the interim, the APC is sending their pulp grade lumber to KPC [the other Alaska pulp mill] for processing. (Emphasis supplied)

These memos show two important points. First, they show that the APC contract issue was raised by the umbrella environmental group at the White House through fairly high levels of the OMB, and that

⁵⁹ Appendix 36, September 9, 1993, Memorandum from Alaska Rainforest Campaign to Alice Rivlin.

⁶⁰ Appendix 37, September 16, 1993, Memorandum for the Deputy Director from Ruth Saunders.

OMB knew what the Forest Service, through the contracting officer, had done to date. Second, they show OMB knew the exact course of action the agency planned to take in the near future.

The final paragraph quoted above is most telling, because (1) it reports that the announced closure is being investigated by the Forest Service with respect to the meaning of terms under the contract, which squares with the first Maynard analysis on July 1, 1993; (2) it reports that the Forest Service told the company that it must continue to utilize its pulp mill to comply with the contract, which was the Forest Service position in the May 20, 1993, letter to APC; and (3) it reports that the likely action by the Forest Service in the near future is notification that if the mill is not opened, then the company *may be in violation* of its contract. That position also squares with the July 1, 1993, Maynard analysis (that “operation” of the mill is only implied in the contract and, in any case, that it may well be occurring because the company’s Wrangell sawmill was still operating). At this juncture, it was by no means a conclusion that APC had breached its contract.

On the same day as the OMB meeting, September 14, 1993, Undersecretary Lyons’ schedule shows that he attended a meeting about Alaskan Issues with Nicholas Lapham of the NRDC, indicating that Lyons was lobbied on the same APC agenda that Lapham covered with the OMB. Lyons admits in his deposition that if his schedule shows his attendance, he was there. The environmentalist’s lobby had begun to penetrate political levels in OMB and the Assistant Secretary’s office in Washington D.C., but the Alaska environmentalists groups also engaged by filing a petition September 16, 1993, with the Regional Forester to suspend additional timber sale offerings under the APC long-term

contract,⁶¹ an action echoed by the national environmental groups in their meetings with OMB and the Assistant Secretary's office. The petition and the lobbying efforts were based on the premature and what is now known to be an incorrect conclusion that APC had breached its contract, and the Forest Service therefore had no obligation to prepare and offer timber to the company under the contract.

On September 22, 1993, less than one week after Lapham met with Lyons, the big three national environmental groups—the Sierra Club, The Wilderness Society, and the Natural Resources Defense Council—along with SEACC, combined their forces and submitted a seven page legal analysis of the APC contractual provisions to Lyons.⁶² The analysis fleshed out a legal rationale for a government action to terminate the contracts, and the groups requested the Assistant Secretary himself to:

take steps to ensure that the Forest Service promptly provides written notice to APC (1) that the company is in breach of contract; (2) that the United States will cancel the contract 30 days after the written notice; and (3) that the Forest Service will cease all timber offerings and prohibit any further logging activities under the contract 30 days after the written notice.

The environmental groups requested that the Assistant Secretary direct and orchestrate their whole APC contract cancellation agenda, an action that might be expected from a fellow “green,” but an action that was not only based on a flawed reading of the APC contract and the law, but on the notion that the Assistant Secretary, as opposed to the contracting officer, should take actions or direct actions concerning APC's contract. This dynamic—the suggestion that Lyons and OMB could direct the

⁶¹ Appendix 38, September 16, 1993, letter from Robert E. Lindekugel, Staff Attorney for SEACC, et. al. To Michael A. Barton, Regional Forester, Gary A. Morrison, Forest Supervisor, and Abigail R. Kimbell, Forest Supervisor.

⁶² Appendix 39, September 22, 1993, letter from Sierra Club Legal Defense Fund, Inc. to James R. Lyons, Assistant Secretary for Natural Resources and the Environment.

decision-making on the contract termination in spite of the contracting officer's analysis and judgment—is what ultimately led to ill-informed, improper, and misguided actions which are not sanctioned under the CDA and that will ultimately cost the government up to \$750,000,000.

C. Significant Environmental Effects: “Green” Group Lobbying Begins And Contracting Officer Control Slips

September 22, 1993, was a day of much activity concerning the APC contract issue as indicated by the electronic message on September 23, 1993, from Al Aitken, Group Leader, Timber Sales, U.S. Forest Service to Michael A Barton.⁶³ Aitken wrote:

Date: 23 Sept 93 10:49

Several events have happened recently that you need to be aware of:

9/16 Ltr. To RF and Forest Supervisors from SEACC containing a petition by several interest groups requesting FS to declare APC in breach and suspend operations. Asks for reply no later than 10/18.

9/22 Ltr. To Asst. Sec. Lyons from Sierra Club Legal Defense Fund in Juneau asking the APC be declared in breach and operations be suspended.

9/22 Bob Lynn [Forest Service Washington Office staff] met with OMB where they requested FS ask for legal opinion on whether APC is in breach. Also ask how long can suspension of operations continue until it becomes permanent. Bob told them it was premature to ask for legal opinion and this was verified by Jim Perry and Rhea Moore.

9/22 National interest groups visited Asst. Sec. Lyons and basically asked the same questions that OMB asked. Perry told them the same answer. There was [sic] indications that the interest groups may try to get some “riders” attached to the Appropriations Bill to deal with this issue. Maynard and I talked this morning. Bob is going to refine the drafts of current proposed letters to APC and believes we definitely need to get a letter out to APC early next week prior to the actual [sic] shutdown. This letter will probably need w/ WO [Washington Office] concurrence.

Barton agreed to meet with Aitken the next day to discuss the events.

What is clear from the record is that after the September 22, 1993, environmentalist lobbying

⁶³Appendix 40, September 23, 1993, e-mail message to Michael A. Barton from Al Aitkin.

activity, the Assistant Secretary's office immediately engaged. Records verify that on September 23, 1993, the Assistant Secretary's confidential assistant, Mark Gaede, requested a copy of a letter that was being prepared to send to APC to further respond to APC's June 30, 1993, notice of shutdown.⁶⁴ The cover page from Maynard to Gaede says, "AS YOU REQUESTED. MY UNDERSTANDING IS THAT FOREST SERVICE REGION 10 IS PREPARED TO SIGN AND SEND THIS TOMORROW AFTER OR FROM YOUR OFFICE. PLEASE CALL ME AT WITH ANY QUESTIONS OR CHANGES . . ."

The letter faxed to Gaede is the exact letter that was sent the following day, September 24, 1993, to APC.⁶⁵ The Gaede message and the Maynard comment on the August 1993 Barton white paper recommendation indicates control of APC contract decisions still remained with Barton; however, the contracting officer's staff sensed that Washington office "concurrence" on the letter would be needed, the Assistant Secretary's office was invited to make changes in the draft letter, and control shifted further from Barton unbeknownst to APC.

What is equally clear is that the September 24, 1993, letter to APC from the government is that the letter addressed actions to further of all three items urged by the environmental groups in their lobbying effort. The letter notified APC that the government believed APC would be in breach of contract for failure to operate the mill. The letter notified APC that it had 30 days to submit information so Barton could evaluate breach, suspension, and termination of the contract. The letter notified the

⁶⁴ Appendix 41, September 23, 1993, fax cover page to Mark Gaede from Bob Maynard with attachment of exact letter sent by Barton to APC on September 24, 1993.

⁶⁵ Appendix 42, September 24, 1993, letter from Michael A. Barton to Mr. Frank Roppel.

company that the Forest Service would immediately suspend its performance by not issuing any new timber offerings. The contracting officer knew of the desires of the environmental groups and knew of the sensitivity of his superiors to their desires. While the course of action taken on September 24, 1993, was not exactly the course of action urged by the environmental lobbyists, each item the groups . . . asked to be addressed, was addressed, and the decision was moved one step closer to termination. The letter also reflected the desires of the contracting officer to get the information assembled to make a determination if the conversion was warranted. It was a perfect response from Barton's perspective in several ways. It kept his superiors happy (and perhaps out of the decision-making) and it gave the company a chance to respond.

The way in which the letter dealt with those issues is very important. Although the letter addressed the actions the environmental groups asked Lyons to take, the response is consistent with the revised internal Barton/Maynard white paper (dated August 30, 1993, with Maynard's comments), and requests reasonable information on which the contracting officer could make an assessment. Barton's letter said:

The announced shutdown of the mill is for an indefinite period of time without any clear statement of an intent to resume operations. You have also stated an intent to continue maximum logging operations to supply the Wrangell sawmill.

We believe that a closure of this nature will lead to Alaska Pulp Corporation (APC) breaching a material provision of the contract which is the requirement to construct and operate a pulp mill. To date, no firm and verifiable information justifying the shutdown has been provided. No plan to reopen the existing pulp mill or to install a new or renovated pulp product facility meeting the terms of the contract within a defined and reasonable time frame has been submitted.⁶⁶

⁶⁶ Id.

Barton's position was not absolute. He stated that the agency "believed" that closure "will lead" to a breach of a material provision of the contract. He did not say APC had breached the contract. This was consistent with the advice from Maynard that a breach would not occur before three months and *could be as far out as five years*. He did not say the shutdown would absolutely *be* a breach of the contract at anytime in the near future. He said the Forest Service believed that a closure of this nature *will lead* to APC breaching a material term of the contract. The question was open, and this was his direct understanding as verified by the August 30, 1993, Forest Service APC white paper.

This position was a rational outgrowth of the language of the contract that did not directly address the situation presented by APC's action of closing one part of the pulp mill and continuing logging. The circumstances simply had not materialized to properly make a breach determination. The approach by Barton left open the distinct possibility that a different kind of pulp mill could be substituted for the dissolving pulp mill, but it held onto the notion that *a* mill had to be operated. This view was based on an assumption or the myth that somehow gained acceptance that APC had a contractual duty to continuously *operate* the pulp mill through 2011, even though such a duty was not stated in the words of the contract. Barton requested that the company submit a response within 30 days for him to evaluate. The request for information about a pulp mill conversion and future APC plans is consistent with the August 30, 1993, Barton/Maynard APC white paper, which calls for APC to stop logging, after May 1, 1994.

By the time the letter was sent, the APC pulp mill closure was only six days away, the decision to indefinitely suspend operation of the mill was irreversible by the company, and closure occurred on September 30, 1993. Approximately 400 employees were given severance packages, and the closure

affected an additional 950 indirect jobs of those who conducted harvesting, transportation, and other small businesses that supported operation of pulp mill. The advice of Maynard—to respond to APC prior to shutdown and request additional information about the company’s plans was taken—and the approach of the contracting officer struck the balance of requesting enough information to protect the government’s position, while still facilitating the conversion of a pulping plant, even though the three demands of the environmental groups to Lyons were essentially met.

The Atkin summary for Barton of the 9/22 activity by the environmentalists in Washington appears to have created some urgency to ensure that the contracting officer promptly responded to APC’s pending closure, given the instances of lobbying and the requests for copies of Barton’s September 22, 1993, letter by the Undersecretary’s office. Up to this juncture, the contracting officer, with the advice of his staff, appears to have remained in control of decisions related to the APC contract, and the letter that went to APC notifying it of the government’s position. This appears to be the product of the contracting officer’s judgment.

The irony of the September 24, 1993, letter is that it set up a contractual, legalistic posture (the posture that Barton avoided on July 1) at the same time that the fruits of the joint Forest Service, APC, State of Alaska effort to investigate the technical and financial feasibility of the MDF conversion were completed. That analysis embraced the MDF mill as *a highly viable option*.

V. Clinton-Gore Team At Its Best: Creating A \$750,000,000 Federal Liability

A. Happy Holidays: A Gift From The Treasury For The “Green” Lobbyists

It took nearly six months from the day the mill closed for the government to perfect termination of the APC contract. As discussed above, the letters and internal documents exchanged between APC

and the Forest Service show an early phase of cooperation between the Regional Forester, who was the designated contracting officer, and APC to facilitate conversion of the dissolving pulp mill into an MDF pulp mill. However, as decision-making moved away from the contracting officer to officials at the highest levels of the Forest Service and Department of Agriculture and as those individuals were continually lobbied by special interest environmental groups, the approach turned from one of cooperation between the agency and the APC on the MDF conversion to legalistic confrontation.

At the same time, the level of cooperation between environmental special interests with no legal interest in the contract and the senior decision-makers within the USDA who pushed to terminate the contract increased. The internal documents show this shift by Forest Service officials outside of Region 10 and by senior Department of Agriculture officials as they morphed the APC “indefinite” suspension of operation of the dissolving pulp mill while it undertook feasibility studies into a rationale that justified their political end: a decision to terminate the contract. In the final analysis, the decision to terminate the contract and to achieve other political goals important to the Clinton-Gore Administration’s agenda was made by individuals outside of the contracting officer.

For example, factors such as the desired outcome of the Tongass Land Management Plan (TLMP) revision contributed substantially to the decision to terminate. The superiors to the contracting officer predetermined that the TLMP revision would lower the maximum harvest by half or more, making it impossible for the Forest Service to fulfil its contractual obligations under one of the two long-term contracts in the Tongass. This was the basis for one would-be contract termination decision-maker, the Chief of the Forest Service, Jack Ward Thomas to strongly favor termination. Indeed the evidence and records show six line and staff individuals, mostly political appointees, above the

contracting officer participated in, formulated, made, and then directed the decision to terminate the contract⁶⁷ without examining the evidence needed to make an informed decision on the merits. Even more troubling from the standpoint of basic fairness of government decision-making, senior officials intentionally and directly misled the company and elected officials into believing that the contracting officer was the designated individual to make the decision whether to terminate the contract. The company was directed to submit materials to the contracting officer when in fact the decision was not being made by the contracting officer.⁶⁸ It is clear that the termination was not required to protect the interests of the United States, and it was equally clear that the termination was to further a political agenda. To reach the goal of termination, words that were not in the contract were imagined into the contract. Desires of special interest environmental groups to terminate were adopted wholesale by the superiors of the contracting officer, and the Department of Justice was eager to provide the expensive “legal” cover to proceed with the costly termination.

On October 12, 1993, about two weeks after the Barton’s September 24, 1993, letter to APC, Assistant Secretary Lyons actively engaged in the APC contract termination issue. Lyons received a briefing at 2:00 PM from Rea Moore (Washington, D.C.) and Bob Maynard (Juneau, Alaska) both of the Office of General Counsel.⁶⁹ A detailed briefing paper captioned as follows was

⁶⁷ In the Forest Service, Jack Ward Thomas, the Chief, was one of these individuals. In the USDA, these individuals included Alphonso M. Espy, Secretary of Agriculture, Kim Schnorr, Counsel to the Secretary, James Lyons, Assistant Secretary of Agriculture, Adela Backiel, Deputy Assistant Secretary of Agriculture, and Mark Gaede, Confidential Assistant to the Assistant Secretary.

⁶⁸ Appendix 43, January 24, 1994 letter from James R. Lyons to George Ishiyama, Alaska Pulp Corporation.

⁶⁹ Appendix 44, schedule for Assistant Secretary Lyons, Tuesday, October 12, 1993.

used at the meeting:

10-12-93 BRIEFING
ASSISTANT SECRETARY, NATURAL RESOURCES AND ENVIRONMENT, USDA
ALASKA LONG TERM TIMBER SALE CONTRACTS TERMINATION
(CANCELLATION)⁷⁰

The title tells it all. As early as October 12, 1993, termination or cancellation of the APC contract was the goal. The briefing covered details of the types of termination, the authority for termination, and the current APC contract situation. Specifically, the outline covered the action ultimately taken by the government on the APC contract—terminate for material breach. In section I.A.2. the outline discussed the option of “[t]ermination for breach or other violation by Purchaser: Government is not liable if justified” and under paragraph B.1. the outline covered termination authority, one basis being “serious or continued violation of contract terms by Purchaser (material breach), a. “anticipatory” breach/repudiation.” Then with respect to the APC situation, the outline reads as follows:

II. CURRENT CONTRACT STATUS

1. “Indefinite” shutdown as of 9-30-93; blames Forest Service TTRA [Tongass Timber Reform Act] modifications, market, etc.
2. Forest Service: failure to operate mill is material breach, except for temporary shutdowns meeting contract section B0.5
3. APC requested to provide further information to evaluate whether to proceed to suspend or terminate operations; due about 10-27-93
4. APC contract section B0.5—excusable shutdowns exceeding 3 months and contract term extension

* * *

IV. POTENTIAL ALTERNATIVES

- Proceed to terminate APC contract for material breach, depending upon evaluation of response to 9-24-93 letter
- Complete TLMP revision: terminate or modify one or both contracts if environmentally

⁷⁰ Appendix 45, 10-12-93 Briefing Paper.

- sound ASQ cannot meet volume requirements
- Terminate contract upon criminal or operation contract violation of sufficient soundness to justify
- Negotiated termination
- No current action

What is interesting, however, is that a superior three levels above the contracting officer was that engaged in the very specific details of the APC contract situation, but had very little recollection about the specific details of the exposure and other factors that supposedly underpinned contract termination by the government. On the one hand, this could be viewed as organization responsibility. On the other hand, particularly when considering the duties assigned to a contracting officer by the Contract Disputes Act, it raises the question of why a politically appointed Assistant Secretary would be so interested in the specifics of the APC situation, especially when the decision was not removed from the contracting officer by his boss, the Chief of the Forest Service, or by the Chief's boss, the Assistant Secretary. Why spend time on this issue if you are the Assistant Secretary and you are not the official designated to make decisions about the contract? Giving the Assistant Secretary the benefit of any doubt, he just wanted to be informed, but the records reveal that he wanted to ensure that the contract was terminated, precisely what the "green" lobby asked him and the OMB to do.

As indicated by the Alaska Rainforest Campaign, Lyons was directing the APC contract issue. "You can achieve half of this goal [meaningful Tongass management reform], by staying with the course *you have already directed the Forest Service to follow* and terminate APC's contract for material breach,"⁷¹ (emphasis supplied) writes the Alaska Rainforest Campaign to the Assistant Secretary. The

⁷¹ Appendix 46, November 15, 1993, letter from Charles M. Clusen, Natural Resources Defense Council, Brock Evans, Vice President for National Issues, National Audubon Society, and

Assistant Secretary and his superiors at the White House were lobbied on the issue and engaged to ensure that the decision went the way their political friends desired (i.e. termination). However, they did not want to take responsibility for actually making the decision that would expose the Clinton-Gore Administration to charges that they were eliminating seven percent of the jobs in the Sitka region of the Tongass or that they would expose the government to charges that it would incur a huge contract breach liability.

Meanwhile, APC began compiling the information requested in Barton's September 24, 1993, letter and replied as directed to Barton on October 21, 1993,⁷² and further on October 2, 1993.⁷³ The first APC letter discussed the shortfall of timber from the company's perspective prepared by the agency in the Tongass to fulfill the government's commitment under APC's contract. It explained that MDF was one of the options under consideration by the company, but the company requested assurances on timber supply before design and construction of such a facility. First, the company requested the agency affirm contract volumes of timber would be provided. Second, the company requested the agency affirm the facility would meet the primary manufacture requirements of the contract. Third, the company suggested that negotiation and resolution of the APC lawsuit over the Tongass Timber Reform Act breach by the government could facilitate the conversion. Fourth, the

Fran Hunt, Forester/Resource Specialist, National Wildlife Federation to Mr. James Lyons, Assistant Secretary for Natural Resources and the Environment.

⁷²Appendix 47, October 21, 1993, letter to Mr. Michael Barton, Regional Forester, from Mr. George Woodbury, Alaska Pulp Corporation.

⁷³ Appendix 48, October 22, 1993, letter to Mr. Michael Barton, Regional Forester, from Mr. George Woodbury, Alaska Pulp Corporation.

letter referenced enclosures and other information on the economic and business data requested to verify the viability of an MDF conversion and for a contract term extension under the *force majeure* clause. The information on MDF plant conversion was detailed; it covered four conversion scenarios and provided detailed cost estimates for MDF mill installation infrastructure and operation, MDF technical manufacturing process, MDF market analysis, and MDF production cost estimates. Thus, the first response provided an up to date review of information to facilitate the MDF conversion and what had been done to date by the company and Forest Service to study the MDF conversion.

The second letter blunted the Forest Service assertion that the closure of the mill will result in the company breaching the contract because it did not operate the pulp mill. The letter reminded the agency that APC complied with the express requirement to build a mill and that there was no requirement to operate the mill, particularly when economics prevent operation. Thus, the 50 year contract contemplated that as economic forces changed, the nature of APC's industrial operation could change, which is precisely what APC was endeavoring to accomplish by conversion to MDF pulping process. The two goals of the contract, according to APC, were full utilization of Tongass timber (pulp and saw logs) and primary manufacture within Alaska. APC observed the following with respect to those points:

We believe that the contract is clear and unambiguous on this point. Even if it is argued that the contract is ambiguous, the intent of both signatories can readily be established from the historical record. That record clearly shows that the United States wanted to utilize fully the Tongass timber resource and to promote the population of Southeast Alaska through the use of that resource in year-round industry. Indeed no one in 1957 could foresee exactly how these goals either would or could be accomplished throughout the 50-year term of the contract . **The result was a contract which allowed for flexibility in how the goals were achieved, recognizing that market forces and utilization standards would likely change over time. The words used by the parties, and those not used, demonstrate this point.** (Emphasis

supplied)⁷⁴

While APC was providing submissions to the contracting officer as instructed, Lyons was clearly engaging in the APC contract issue, and the environmental lobby did expand their efforts beyond influencing him and the White House. It also reached the legal staff of the USDA when the NRDC and the Sierra Club Legal Defense Fund wrote to Rea Moore, a Washington, D.C., USDA attorney who was advising on the APC contract.⁷⁵ The November 17, 1993 letter to Ms. Moore laid out two contract interpretation theories⁷⁶ that the environmentalists wanted the government to adopt, theories that appear to have later become the government's position and be quite expensive to the taxpayers. The first environmentalist theory was that "APC'S CONTRACT REQUIRES OPERATION OF THE PULP MILL" and second, that "THE FORCE MAJEURE CLAUSE DOES NOT APPLY" to extend the term of the contract.⁷⁷ These rather specific legal conclusions were clearly advocacy, rather than a balanced, thoughtful analysis showing strengths and weaknesses of whether material obligations can be

⁷⁴ Id.

⁷⁵ Appendix 49, the following handwritten notation appeared on the top of the letter shows that Ms. Moore actually received the letter and passed it to Lyons' office: "Hand Deliver to: Rich Grand (Lyons Office), Rhea."

⁷⁶ Appendix 50, November 17, 1993, letter from Nathaniel Lawrence, Natural Resources Defense Council, Eric P. Jorgensen, Sierra Club Legal Defense Fund, Inc., Thomas S. Waldo, Sierra Club Legal Defense Fund, Inc. to Rea Moore, Office of General Counsel, U.S. Department of Agriculture. Also included in this appendix is evidence that the Forest Service analysis provided by the environmental groups influenced agency analysis and positions regarding the agency response to APC's 10-21-93 and 10-22-93 letters: the paper "reflects review of scldf [Sierra Club Legal Defense Fund] 11-17-93 letter and enclosures. . ."

⁷⁷ These theories were not surprising given the groups' past positions on the Tongass timber contracts and timber harvesting in national forests generally.

implied and read into the contract. The special interest groups exhibited what might be described as sheer arrogance by telling Ms. Moore exactly what she was to advise Mr. Lyons, who was from their perspective in control of the APC situation and the basis on which she should render this advice: “The only viable response for the agency at this point is to cease performance and inform APC that its material breach terminated the contract, and we ask that you so advise Assistant Secretary Lyons.”⁷⁸

The closing is also telling of the position that the environmental special interest groups enjoyed with the USDA lawyers and their political overseer, the Assistant Secretary. They viewed themselves more like colleagues on the same side, rather than groups advocating a special interest point of view:

We look forward to working with you in the coming weeks on this issue. We are continuing our analysis of these problems and plan to supplement these ideas as we are able soon. Please call us if you have thoughts or questions.⁷⁹

Indeed the groups were acting as surrogate government lawyers, but they had a special interest mission to terminate the contracts, *not* a public interest mission to evaluate the facts, circumstances, risks, or down-sides objectively. In addition to the letter, the groups also forwarded a 58 page jointly prepared document titled, “CANCELLATION OF LONG-TERM TIMBER SALE CONTRACTS ON THE TONGASS NATIONAL FOREST: A LEGAL ANALYSIS OF GOVERNMENTAL AUTHORITY AND POTENTIAL LIABILITY” to Ms. Moore.⁸⁰ This work did what its title suggested. It advocated for the cancellation of the APC contract.

Sometime in early December, while the “green” groups were lobbying USDA legal staff and

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Appendix 7.

Lyons, Barton or his staff drafted a reply to the October 21 and 22 submissions by APC.⁸¹ The reply was to George Ishiyama, the Chairman and President of APC. *While the letter was never sent*, it is telling of how Barton would have approached the APC situation at that juncture had he been free to exercise his own judgment as the contracting officer. The letter says that Barton's staff is reviewing the October APC submissions, but Barton wants to:

take the opportunity to encourage a discourse between us regarding the contract.

The Alaska Pulp Mill (APC) closure in Sitka has had major social and economic impacts on the community. The Forest Service has a strong interest in assisting the community by continuing to meet the terms of the APC timber sale contract. To that end, *I want to reaffirm our commitment to work with you and Frank to find an alternative solution that will allow APC to continue operating this contract.* It is urgent that we arrive at that solution soon. The alternative solution must include some type of pulp process that would meet the intent of the contract. *A medium density fiberboard product would meet that intent.*

The Forest Service understands that there is a significant amount of planning and financial decisions necessary to convert the plant. For the agency to continue the contract, APC needs to provide a schedule that identifies when various phases of the planning will be completed, how the pulp logs will be utilized in the interim, and when implementation of the plan can begin. That schedule needs to be provided within the next 30 days [can use a date or just substitute "very soon"]. (original bracketed)

I would be happy to meet with you and Frank with the goal of reaching a mutually satisfactory solution and look forward to receiving your schedule before 1994.⁸²

At about the same time as the Barton-Ishiyama draft letter, Chuck Clusen of the NRDC again contacted the Deputy Director of OMB, Alice Rivlin, on December 6, 1993, and employed the classic environmentalist "sky is falling" hollow tactic to push for contract cancellation:

⁸¹ Appendix 51, undated letter to Mr. George Ishiyama, Chairman and President, Alaska Pulp Corporation from Mike Barton.

⁸² Id.

Today both contracts [the APC and KPC contract] continue to result in the kind of environmental degradation that the TTRA [Tongass Timber Reform Act] sought to end. The warning signs of impending ecological and economic disaster are evident. The only cure is to cancel both 50-year contracts.⁸³

In a handwritten note on the top of the Rivlin letter, Clusen is blunt about what he wants Rivlin to do:

“This is the opportunity to cancel the 50 year contracts on the Tongass. Please help. Chuck.” Clearly the “green” lobbying effort had touched all levels of government that could make the cancellation a reality. Cogswell, Glauthier, and Rivlin were the OMB players who could influence and direct the contract cancellation. Gaede, Grand, Moore, and Lyons were the USDA players who could work inside the organization to ensure that the contract was canceled. All were now engaged, and the message to cancel the contract was reinforced regularly.

The “green” group advocacy was supplemented on December 10, 1993, when Ms. Moore received another legal analysis from the Sierra Club Legal Defense Fund.⁸⁴ Her own writing on the top of the letter forwarded the analysis to Lyons’ office: “Hand Deliver to: Rick Grand (Lyons office) Rhea.” As it turns out, the analysis was quite incorrect in predicting that APC could not “surmount the formidable obstacles to establishing liability [on the part of the government for cancellation of the contract].” The point of the legal analysis was to show how the emerging proposal from APC to convert their present pulp mill into an MDF pulp mill was not permissible under the contract. In fact, prior Forest Service analysis of this point turned to standard industry definitions of terms like “pulp,”

⁸³Appendix 52, December 6, 1993, letter from Charles M. Clusen to Alice Rivlin, Deputy Director, Office of Management and Budget.

⁸⁴Appendix 49, December 10, 1993, letter from Sierra Club Legal Defense Fund to Ms. Rhea Moore, Office of General Counsel, U.S. Department of Agriculture.

“pulp mill,” and “fiberboard,” which clearly mesh to conclude that fiberboard is made from a pulp in a pulping process. That is indeed what Barton had concluded and what Region 10 Forest Service documentation suggested. As early as three days later (on December 13, 1993), the NRDC and nine “green” groups sent another follow up letter to Lyons.⁸⁵ The letter credits Lyons with the actions he directed to date: “The Forest Service, under your direction, has already notified the company that these actions would breach the contract.” The letter ends with the following telling line about who is in control decision-making about this contract: “Your decision to cancel APC’s contract would be an important step in realizing this goal [a sustainable future for the Tongass.]”⁸⁶

December 17, 1993, was the first time that the true implications of the possible APC contract cancellation decision were noted by USDA budget officials. The memo by USDA Office of Budget and Program Analysis Budget official, Mike McDonald,⁸⁷ was telling for another reason as well. In uncommon candor, McDonald tells the real concern of the individuals who were beginning to direct contract cancellation decision.

As you know, Mr. Glauthier and Ms. Rivlin came to their current jobs with OMB with some knowledge and views about the long-term contracts. Ruth Sanders contacts FS and OGC staff regularly to provide updates on the situation. Ruth’s impression is that they **both would like to take advantage of the situation and get rid of the contracts**, but are constrained by the possibility of a misstep exposing the government to liability for hundreds of millions of dollars in

⁸⁵ Appendix 53, December 13, 1993, letter from numerous environmental groups including the Natural Resources Defense Council and Sierra Club Legal Defense Fund to Mr. James Lyons, Assistant Secretary for Natural Resources and the Environment.

⁸⁶ Id.

⁸⁷ Appendix 54, December 17, 1993, Memo from Mike McDonald, USDA, Office of Budget and Program Analysis, to Scott Steele, Larry Wachs, and Steve Dewhurst.

damages **to be paid from discretionary accounts**. (Emphasis supplied)⁸⁸

Thus, the Administration officials at OMB saw an opportunity, but they were *not* concerned with the amount of or likelihood of the “hundreds of millions” of dollars in potential liability that may be paid by the taxpayers. They were concerned about the impact of any money judgment on the *agency’s own budget, their discretionary accounts*, which are paid through appropriated dollars. Even while budget analysts flagged the concern, the financial implications and the socio-economic implications were ignored by the “green” groups that continued to lobby Clinton-Gore Administration higher ups to cancel the APC contract. At the conclusion of 1993, several “green” groups (American Rivers, NRDC, Sierra Club Legal Defense Fund, SEACC, and The Wilderness Society) jointly scheduled a meeting with Lyons for January 7, 1994, to discuss the APC contract cancellation: “We look forward to seeing you in January. Happy Holidays!” said the memo to Lyons’ assistant that confirmed the meeting.⁸⁹ While the holidays may have been happy for some of the environmental advocates, they were quite difficult for those in Sitka who had lost their family wage jobs but still hoped for the MDF conversion. While none realized it yet, their hope was in vein.

B. Happy New Year: The Deception Deepens As Lyons Takes Control

On January 3, 1994, Jim Lyons was engaged enough in the APC contract termination issue to lead a meeting held in Seattle, Washington, with APC representatives (Frank Roppel and George Woodbury), Forest Service representatives (Chief Jack Ward Thomas, Mike Barton, and Bob

⁸⁸ Id.

⁸⁹ Appendix 55, December 27, 1993, Fax Memorandum to Margret Wetherald, Rick Grand from Nicholas Lapham.

Maynard), and staff of Alaska Senators Ted Stevens and Frank Murkowski. The meeting was requested by Senator Murkowski to facilitate discussion between APC and the Forest Service about the MDF conversion. The meeting was chronicled by the notes of Chief Jack Ward Thomas and the deposition of Mike Barton (Volume 3), which are largely the basis of the following summary.⁹⁰

The company made a detailed presentation of the situation from its perspective and the work that they had undertaken to date on the conversion. Lyons asked if the company had a “detailed proposal” available. However, the company reiterated its request for assurances that the government could meet *its* contract requirements (the timber supply obligation) so that the company could justify and secure the capital cost of \$40 to \$50 million for the MDF conversion. At that juncture, Lyons reiterated the position that he viewed the company in breach, that the company needed to answer questions about MDF fulfilling contract requirements, and about the ability of APC to finance a conversion. Lyons said a letter discussing financing was needed promptly. The company understood that the government needed to know if the money and technology for an MDF conversion were available, and the company promised such a letter, but it needed to know whether the timber supply would be available to secure the financial backing for the conversion.

This dynamic set up a catch-22. The Government wanted assurances (on financing and feasibility) from APC that it would indeed follow through and convert the mill, which were contingent in part on financing; and APC wanted assurances that the government would continue to perform its end

⁹⁰ Appendix 9, journal notes of the January 3, 1994, meeting that were maintained by Chief Jack Ward Thomas. In addition, staff composing this report was present at the meeting and generally concurs with Chief Thomas’ entries.

of the deal by supplying timber, which would give it a viable contract for purposes of financing the MDF conversion. Nonetheless, the company representatives directly made the commitment at that meeting that if the Forest Service has the timber supply, then the company would make the investment. APC informed Lyons that the State of Alaska committed to assist with up to \$40 million in financing and eight companies had already indicated some level of interest in participating in the MDF conversion. At the same time, the company expressed concerns that if it said it was going to make the MDF conversion for certain, then the government might say the company is somehow in breach of contract, so it requested a commitment that MDF would indeed qualify under the contract. They requested their submissions to be the basis for a discussion, not a quick termination decision. In short, APC requested a fair hearing.

After the meeting ended, the government officials remained and talked longer. In response to Lyons' question, Thomas' notes indicate that Barton thought he should send the letter informing APC that it was in breach, *but allow the company to begin operation or submit a plan*. The odd notion about the meeting according to Barton's deposition testimony was that, while Barton was the contracting officer, Lyons directed the meeting, and APC asked for a contact point through which to submit material and get answers, even though Barton was known to be the contracting officer. Barton said that Lyons subsequently selected him (Barton) as the contact point, or liaison, as Barton put it, but in light of what Lyons told his staff a day later, he apparently viewed himself as the actual APC contract decision-maker.

The following day, in spite of Lyon's request for more information from APC, Ruth Saunders of OMB was told by Mark Gaede (Lyon's Confidential Assistant) that, "Jim has decided to inform APC

that they have breached their contract, but he won't announce the decision until he's had a chance to meet again with Steven's [sic] and Murkowski's staff."⁹¹ Up until that point, the position of the government communicated to APC through the contracting officer, had been only that APC's action of closing the mill indefinitely "will lead to" a material breach of the contract, not that the actual breach had taken place. The fact that Lyons' was *de facto* asserting control of the real decisions on the contract is verified by the options briefing paper that explains the three versions of the breach-show cause letter that was directed by Lyons as a result of the January 3, 1994, meeting. While the letter preferred by Barton at that juncture was not ultimately sent, the Region had only "recommended" an option, and the wording in the letter was vastly different than the very first letter drafted in late November or early December⁹². It appears as though the recommendation of "doj [Department of Justice] and Rhea" to send the "12-12 clean notice draft and covering anything else about MDF and timber supply in a separate letter"⁹³ prevailed, because the actual show-cause letter sent to APC six days later had no mention whatsoever of MDF or timber supply. No subsequent written communication from the agency gave assurances of timber supply or verified that MDF would qualify from the Forest Service viewpoint.

This approach did not square with the internal deliberations of the Barton on both issues. Early on, Barton and his advisors had used industry definitions and standards to conclude that an MDF plant

⁹¹ Appendix 56, January 4, 1994, e-mail message from Ruth Saunders to Ron Cogswell.

⁹² Appendix 57, bates number 028 0002.

⁹³ Appendix 58, January 7, 1994, e-mail message from Robert Maynard to r. lynn [Robert Lynn].

would indeed be considered a pulping process.⁹⁴ The view that MDF would satisfy a “pulping process” requirement is found in the “APC WHITE PAPER, 8/30”⁹⁵: Question four is, “What are the criteria to be met for an alternative facility in lieu of a pulp mill that will meet the contract definition of a pulp mill?” The white paper cited longstanding definitions from the Society of American Foresters for the following key terms: “pulp mill,” “lignocellulose,” “wood pulp,” “fiberboard,” and “defibration,” and then concluded that, “The one main criteria to be met if an alternative product is produced is that it must be a product made from wood fibers that have been separated. This product would then meet the definitions above for wood pulp and pulp mill.” Three months later the conclusion was even more clear. A December 13, 1993, memo from Maynard to Moore covering points raised in the December 10, 1993, Sierra Club Legal Defense Fund memo to Moore (and forwarded to Lyons) that sought to justify cancellation of the contract clearly stated the Forest Service’s view that MDF would satisfy the “pulp mill” requirement of the contract:

The argument that an MDF plant can’t be considered a pulp mill within the definition of the contract has weak points. The contract in B3.11 provides for a pulp mill and associated facilities. The fact that the MDF process goes beyond manufacturing pulp to converting the pulp to a more valuable end product is therefore not a very strong basis for concluding that it does not count as a pulp mill. The MDF facilities would still incorporate a pulping plant.⁹⁶

No official within the government—not the Assistant Secretary, the Chief, the Regional Forester, or any Forest Service official at the APC-Lyons January 3, 1994, meeting or subsequently—ever told APC

⁹⁴ Barton testified in his deposition on 8/12/96 that in late 1993 or certainly by January 3, 1994, he determined MDF was a pulping process. Barton deposition Volume 3, page 561 and 363.

⁹⁵Appendix 33, August 1993, “APC White Paper” with Maynard comments on 8-30-93 [Doc. 42 -009-0001].

⁹⁶Appendix 60, December 13, 1993, electronic Note from Robert Maynard, to Rhea Moore.

that an MDF mill falls within the definition of a “pulp mill” under the terms of the contract. This created a great uncertainty, from the company’s perspective, and a good rationale for hesitating to give an unequivocal answer that it would indeed commit significant funds and resources to the conversion at that juncture. Other business rationales for the company’s position existed because feasibility work was underway, but APC’s approach of not firmly committing at that time was reasonable.

At the January 3, 1993, APC-Lyons meeting, the government also clearly knew that answers to timber supply questions (i.e., could the government meet the long term timber supply obligations under its contract) were central to assist APC in moving forward with the MDF conversion. However, no one attending on behalf of the government was willing to discuss that issue either, even though the Chief had reservations, as indicated by his December 17, 1993, journal entry about the level of timber that would be allowed under the new Tongass Land Management Plan under development by the Forest Service.

It was also necessary to face up to the fact—for the first time—that the Forest Service, given the changing situation in Alaska, simply cannot meet the volumes of timber we are contractually obligated to meet for the two long-term contracts. And, that does not even consider the demand by the “independent” mill operators in Alaska who are not protected by the certainty of contracts and who must, like all other timber companies in the United States, compete for timber to feed their mills in the open market.

That was not made clear to me by staff who asked me to sign, or let Mike Barton (the Regional Forester in Alaska) sign a letter that tells Alaska Pulp Company at Sitka that their mill closure was in breach of contract and that we have and would continue to supply the contracted timber volumes to meet the need of the mills. Upon detailed questioning, it became obvious that the initial estimates of annual sale quantity projected in the draft Forest Plan as 400 mm bf [million board feet] was, in reality, likely less than 200 mm bf. That is the volume of timber necessary to meet only one of the contract obligations.

I refused to sign the letter on the grounds that it simply was not true—the Forest Service cannot meet the contractually obligated timber volume over the longer term.

I did, however, agree (along with Jim Lyons) that we would send a letter over Mike Barton's signature that we had met our contract up to this point and, therefore, the company was the one in breach of contract. If this turns out, in whatever fashion, to be a cancellation of the contract, it will be a significant change for the better for the forest resources of Alaska.⁹⁷

Thus, it is apparent that going into the January 3, 1994, APC-Lyons meeting, the decision to "send a letter over Mike Barton's signature" to APC saying that the company had breached its contract was already made—by Lyons.

The candid rationale offered from the Chief's perspective was a predetermination three years in advance of the Tongass Land Management Plan revision that the plan would indeed reclassify more acres allocated for timber harvest in the Tongass out of timber harvest status. This is an intriguing insight in light of the fact that Forest Plans are supposed to be developed and recommended through the Forest Supervisors, to the Regional Forester, who then makes decisions concerning forest plans. Additionally, it is an odd conclusion, given that the land planning process was three years away from producing the final result and the basis for the final result. What the Chief was saying in this journal entry is that because the land plan will need to take so much land away from what Congress left for timber purposes when it passed the 1990 Tongass Timber Reform Act, only one of the contracts in the Tongass can be met, so we might as well cancel this one. At least the Chief was honest enough to admit this and to refuse to sign a letter saying that the Forest Service would continue to meet its timber supply obligation.⁹⁸

⁹⁷ Appendix 9, December 17, 1993, transcription from journals maintained by Chief Jack Ward Thomas, Produced August 5, 1996.

⁹⁸ The Chief's observation of this fact makes the governments's argument in its most recently filed motion for summary judgment (i.e., that APC had not given it assurances that it could and would buy all of the timber it was obligated to buy under the contract, so the government was justified in

The position of Barton at that juncture, in December 1993, was also set out by Thomas in a memo to Lyons.⁹⁹ At that juncture, Barton's response would have been as follows:

- The government intends to honor the volume commitment under the APC contract provided that APC carries out its performance of the contract.
- Tells APC that the Forest Service understands that a medium density fiberboard process meets the definition of mill for the manufacture of pulp.
- Notifies APC that the Forest Service cannot administratively modify the contract to accommodate TTRA revisions requested by APC.
- Notifies APC that by February 1, 1994 they must submit a plan and schedule for resuming operations in the present mill or an acceptable converted facility. Failure to do so will lead to contract termination.¹⁰⁰

This summary prepared by the Chief confirms exactly what Barton would have said during the January 3, 1994, meeting with APC facilitated by Alaska's Senators. The approach Barton would have taken on his own volition would have been to allow APC to open the mill or submit a *plan*.

The rationale for failing to address the timber supply issue (i.e., giving APC the assurance it requested so that it could move forward with MDF) is also more easily understood in light of a January 7, 1994, meeting between Deputy Director of OMB, Alice Rivlin and the Alaska Rainforest Campaign. Ruth Saunders writes to Ron Cogswell January 7, 1994, about the January 3 meeting between Rivlin and the Alaska Rainforest Campaign:

I've gotten word that USDA is considering an alternative to outright cancellation of the APC contract. Lyons met with APC representatives and Alaska delegation staff on Tuesday to discuss conversion of the closed APC pulp mill to a medium density fiberboard plant. This is what Alice asked about during our Monday meeting with the Alaska Rainforest Campaign.

breaching the contract) almost disingenuous.

⁹⁹ Appendix 61, Undated version of January 7, 1994, Informational Memorandum for James R. Lyons from Jack Thomas, Chief. (Doc. No. 2446 FL)

¹⁰⁰Id.

Such a plant would only employ about 70 people. I do not know how seriously USDA is considering this alternative. This option would continue the contract's guaranteed flow of timber to the APC mill and likely result in the problems we discussed during the meeting— i.e. **potential legal challenges to supplying the required timber volume while still complying with numerous environmental statutes.** (Emphasis supplied).¹⁰¹

Thus, the OMB had been lobbied to stop the “guaranteed flow” of timber (i.e. cut off supply and break the government's commitment of the contract). The threat was that the Barton approach, and if the contract was not terminated immediately, then lawsuits, presumably by the group, would stop the sales anyway, and the government would not be able to supply the timber to APC. This buttressed the environmental group strategy on the Tongass Land Management Plan revision, which was to remove harvestable acreage in the plan revision, thereby lowering the volume of timber available from the Tongass. The message was that the government should try to escape the agreement it made in 1957 by outright termination of it. That way the Alaska Rainforest Campaign's goal for the land planning process—to reduce areas for harvesting timber—would be more easily achieved. The implications of the pressure for outright termination operated as yet another constraint on giving APC the timber supply assurances that, in retrospect, the company properly and astutely requested. The termination of the contract was shaping up to be a mere pretext for the preferable outcome of the new Tongass Land Management Plan. Lobbying by the environmental groups was having the desired effect.

In addition to Rivlin, the environmental groups also met with Lyons on January 7, 1994.¹⁰² To prepare for that meeting, Rhea Moore sent Rick Grand the 12-12-93 clean termination draft with a

¹⁰¹ Appendix 62, January 7, 1994, e-mail message from Ruth D. Saunders to Ronald M. Cogswell and Mark A. Weatherly, Office of Management and Budget.

¹⁰² Appendix 63, January 7, 1994, Schedule for James Lyons.

transmittal slip that said: “Rick-I gave Jim [Lyons] some stuff earlier this morning and promised to send this over as well. You were out of your office when I dropped by. Good luck in today’s meeting. Rhea.”¹⁰³ Apparently, Grand and Lyons had a draft termination letter (and other material) for their meeting with the environmental groups on January 7, 1994. Whether they shared the material or the approach offered in the letter is unknown..The same day, Lyons actively engaged again on the “green” groups’ APC contract termination agenda. Lyons wrote a telling memorandum to Will Stelle, then Associate Director for Natural Resources, a deputy of Kathleen McGinty, at the White House.¹⁰⁴ This time he spelled out three options under consideration for the APC contract. All three options would give the company notice of the “contracting officer’s” intention to terminate the contract unless the mill resumes operation within 30 days. Lyons already knew from the January 3, 1994, meeting with the company that opening the mill or making the conversion in such a short time frame was impossible because employees had already been given severance, the mill processes were shutdown, and APC was devoting time and resources to converting the mill to MDF. All options would give APC the chance to “show cause why the contract should not be terminated for breach.”

Option one would say that if the company wants the government to consider an MDF conversion in lieu of operation of the present pulp mill, then it should make that proposal and a “firm commitment” for financing within 30 days. Lyons knew from the meeting with APC four days earlier that aspects of the proposal had already been submitted, that collecting other pieces of the analysis

¹⁰³ Appendix 63-A, 1-7-94 U. S. Department of Agriculture, Reference Slip to Rick Grand From Rhea [Moore].

¹⁰⁴ Appendix 64, January 7, 1994, Memorandum for Will Stelle, from James Lyons.

would take time, and that a “firm commitment” on financing was not possible until the technical and financial feasibility studies (that were underway already) were completed. The second version would add to the first version a warning that future timber supplies would not be guaranteed. This would have created an added problem for APC in moving forward with the MDF conversion, because it would have been a signal that the APC contract volumes may not be met in the future and given the company rationale for blaming the breach on the government. The third version would reject consideration of an MDF conversion. This position was inconsistent with the prior work that the Forest Service had done to facilitate a conversion, work that showed positive technical feasibility and the most economically feasible operation of the MDF mill at full contract volumes, and inconsistent with the Forest Service determinations that an MDF mill certainly included a pulping process.

Each option, foreclosed the conversion of the mill to MDF and led to greater likelihood of a risky, expensive legal confrontation with APC for the government. Each option also fulfilled the desires of the “green” lobbyists who pushed the APC cancellation yet again to Lyons and his superiors at OMB on the same day. Perhaps the most telling notion in the Lyons-Stelle memorandum was the fatal recommendation to his superior at the White House that laid out Jim Lyons exact game plan to breach the APC contract:

I recommend that the Forest Service notify APC that within 30 days of receipt of the letter they must submit a plan and schedule for resuming operations in the present mill. Failure to do so will lead to a contract termination. APC will respond with a proposal to build a medium density fiberboard mill. The Forest Service response to this proposal would be to find this unacceptable under the contract and proceed with termination. In the same letter, the Forest Service will inform the APC that they would be very happy to work with the company on a medium density fiberboard plan outside of the long-term contract. The letter would also state

the Forest Service's willingness to work with Alaska to secure jobs.¹⁰⁵

Lyons' recommendation shows the true pre-decisional, top-down nature of the APC contract termination by the government, as the environmental lobbyists requested and without consideration of the merits or down-side risk of exposing the taxpayers to contract breach damages. Not only were decisions clearly being made three levels above the contracting officer, but they were being vetted in the White House. Under any scenario outlined by Lyons the contract would be terminated, which was not the same as an honest evaluation of materials submitted that Barton and Maynard had contemplated and discussed with Lyons on January 3, 1994. To Lyons, it also did not even matter what APC submitted on MDF, what the Forest Service helped to determine on the feasibility of an MDF conversion, or what Barton, the contracting officer produced using his judgment. Jack Ward Thomas' notes of conversations right after the January 3, 1994, meeting with APC verify that Barton thought (at the time) that sending a breach letter *that also allowed APC to submit "a plan,"* or in Maynard's words at the meeting, "Send the [breach] letter . . . that give[s] them a chance to suggest *"something else."* The Barton approach was *not* taken in Lyons' recommendation to Stelle and not taken in the breach letter which was to come shortly thereafter. In any case, under Lyons' "recommendation" whatever APC would have submitted would not have mattered to the outcome.

With no direct knowledge of the extensive lobbying activities by the environmental special interests or Lyons' recommendation to Stelle or his outline of the course of action that would follow, APC acted on their promise to Lyons on January 3, 1994, to submit a further commitment on the

¹⁰⁵ Id.

financing of the contemplated MDF conversion. The commitment came in the form of a January 10, 1994, letter from Mr. George Ishiyama, President of the Alaska Pulp Corporation, to Lyons.¹⁰⁶ The letter gives assurances that the first studies (economic and technical) of converting the mill indicate MDF was indeed feasible, and that further studies are underway. If the studies confirmed the initial findings, then Ishiyama stated that, “it would be our intention to promptly proceed to take the necessary steps to convert the mill to MDF production.” Ishiyama also conveyed to Lyons that as the further economic studies occur, the company will inform Lyons of more specific details to finance the conversion, but that no difficulties are expected in financing. The probable conversion was all the more feasible because the company had substantial infrastructure already located in Sitka and a contract that would supply timber for approximately 17 additional years, the most critical factor to obtaining financing. In business terms, this meant the company was taking the steps it could to justify the financing to complete the conversion. The letter was a substantial step on the part of the company. It had a 30-plus year relationship with the Forest Service in the Tongass, and costly infrastructure that would facilitate the conversion even more. It was a commitment from the highest level of the company that (1) past feasibility work was positive and (2) the company was moving forward in the most prudent manner possible on accomplishing the MDF conversion.

On January 10, 1994, three days after the assurances to Lyons from Ishiyama, Vice President Gore or his staff requested through the new Deputy Assistant Secretary, Adela Backiel (Lyons’s new deputy), talking points on the termination of the APC contract. The guidelines for the talking points did

¹⁰⁶ Appendix 65, January 10, 1994, letter from Mr. George Ishiyama (Tokyo) to The Honorable James Lyons.

not discuss the options or whether to terminate. It sought rationale to terminate:

(1) why it is good public policy to terminate the contract; and (2) what positive impacts would it have on employment and economics in SE [Southeast Alaska]. Adela had to give those to Gore this AM for a presentation. I don't know what the presentation was. Rhea is also working on talking points on the contract side. We'll forward when received from Rhea.¹⁰⁷

The e-mail describing the Vice President's desires was to the contracting officer, and the political pressure was apparent. Thus, the Vice President's desire to terminate APC's contract and his needs for "a presentation" describing benefits of a termination, unbeknownst to APC, began to further drive the outcome of the government's position and decision toward termination. At a minimum, it sent a signal to the Vice President's political underlings—from the Secretary on down the chain of command—that termination was *the* outcome expected by the Vice President. After all, the talking points were needed for his presentation, which, after given, would lock in the termination even more. Those talking points were prepared on January 13, 1994,¹⁰⁸ the day APC was notified that it was considered in breach of the contract by the government.

For Moore and Maynard's part, they forwarded a paper to "adela & white house"¹⁰⁹ that were part of the talking points. That briefing paper highlighted the early observation of Maynard on a critical issue that would later form the basis of the Government's liability.

While the contract *does not contain express terms requiring operation of the pulp mill*, it is the view of the Office of General Counsel, USDA and of the Civil Division, Department of

¹⁰⁷ Appendix 66, January 13, 1994, electronic message from Magnus E. Chelstead to Michael A. Barton referring to a prior message of Robert L. Lynn.

¹⁰⁸ Appendix 67, January 13, 1994, two pages of talking points on Cancellation of the Alaska Pulp Company Contract.

¹⁰⁹ Appendix 68, January 13, 1994 electronic message from Robert Maynard to Mike Barton.

Justice, that the history and contractual language will support the position that operation of a pulp mill is required.¹¹⁰ (Emphasis supplied)

Thus, Maynard's early observation that "operation" of the pulp mill was only an "implied" obligation was reinforced to the litany of decision-makers who were taking the steps toward termination of the contract. In an attempt to be fair to the Department of Justice and the USDA Office of General Counsel, the Chairman of the Committee issued subpoenas for all documentation that might corroborate this legal conclusion, *but not a single such analysis was produced to the Committee.*

On a question so central to the expensive, major action that the government was preparing to take, the lack of any legal memorandum, legal analysis, or legal research paper or even notes justifying the position about to be taken is grossly negligent decision-making on the part of the government. No government document justifying the legal conclusion that a material term of the contract could be implied was produced. No government document backed up the conclusion that a material, implied term of the contract would absolutely or even more likely than not justify the government's claim that APC had repudiated the contract. Perhaps the government lawyers relied on the biased legal advocacy submitted by the environmental groups during the Fall of 1993 and imagined that the contract should be terminated.

Decision-makers from the Vice President on down the chain *were informed* through these talking points that operation of the pulp mill was not an express term of the contract. They knew that the government would rely heavily or almost exclusively on the failure to operate as *the* reason to

¹¹⁰ Appendix 69, January 13, 1994, "CONTRACT TALKING POINTS," forwarded to M. Barton from Robert Maynard.

justify that APC had repudiated the contract, *yet none of those decision-makers did anything about investigating, verifying, or questioning that the government was taking a legally justified position.* This became all the more apparent as the case was litigated. In Court of Claims, the government asserted that such a key term as operation of the mill (in the words of the government the “linchpin” provision and the “fundamental premise” of the contract)¹¹¹ would be an implied and not stated term in a contract that spans 50 years of economic cycles and changing technology.¹¹²

On January 11, 1994, the day following the Ishiyama letter to Lyons and the request for talking points for the Vice President, Lyons again engaged to push termination of the APC contract, this time with Katie McGinty, the Director of the White House Office on Environmental Policy, the senior most environmental advisor to the President and Vice President. In Lyons’ January 11, 1994, memo to McGinty, Lyons recounted much of what he wrote to Stelle, except he eliminated the option of a letter that warned APC that the timber supply might not be available. If the government were to admit this fact, then it would be admitting that at least part of their reason for canceling the contract was because the government may be unable to perform their obligations under the contract, which would bolster a potential APC claim that the government was repudiating the contract.

Lyons was more precise in his recommendation to McGinty. He specified that the letter notifying APC that it must submit a schedule to resume operation of the “present mill” within 30 days, otherwise termination would result, should be sent on January 13, 1994. Lyons, with good basis from

¹¹¹ December 3, 1998, brief of the United State’s in a motion for partial summary judgment at 8-9, 14.

¹¹² Appendix 69, *see* third bullet point and discussion at section VIa., *infra*.

his January 3, 1994, meeting with APC again speculated that APC would respond with an MDF proposal, and the “[m]y response to this proposal would be to find this unacceptable under the contract and proceed with termination.” Lyons, this time with the Ishiyama letter and assurances in hand and while knowing that APC is undertaking feasibility work, repeated his “recommendation” to his superior at the White House. No matter the action APC would take on financing and technical feasibility, Lyons’ own words show he was going to get APC’s contract terminated. The approach and judgment of the contracting officer did not appear to matter, nor did submissions by APC, nor did the legal exposure to the United States. The decisions about APC were being made in the upper levels of USDA and the White House, well above the contracting officer.

C. The Lyons Track To Cancellation: You Breached, So Cure Or Show Cause

On January 13, 1994, per direction from Lyons’ office and *with the apparent approval of the White House*,¹¹³ the breach, “show cause” letter was sent.¹¹⁴ It is noteworthy that at this critical stage approval of the breach letter was coming from the White House, five levels above the designated decision-maker. Mr. Rick Grand addressed the status of the Alaska Pulp situation for the weekly update of Jim Lyons’ office:

“(Steve, the following information is highly sensitive. This letter is awaiting White House approval, before being sent. I expect the letter will go out this afternoon. Please contact me if you have any questions.)”¹¹⁵

¹¹³ Appendix 70, undated (but probably written on January 13, 1993) Memorandum for Steve Brody from Rick Grand, updating the Natural Resources and Environment Weekly Report.

¹¹⁴ Appendix 71, January 13, 1994, letter from Michael A. Barton to George Woodbury.

¹¹⁵ Appendix 70.

The letter notified APC that the government contended the company was in “material breach” of its contract for “continuing the shutdown of the pulp mill.”¹¹⁶ The letter gave APC 30 days to remedy the breach by “resuming continued year-round operations of the Sitka pulp mill.” The contracting officer and the Assistant Secretary knew that this was impossible. The government blatantly rejected an extension of the contract term under the *force majeure* clause of the contract, characterizing APC’s closure as a “permanent shutdown,” not the “indefinite” shutdown APC had announced and notified the government about. The government ignored the seven months of work by APC, much of it with the assistance of the Forest Service, to evaluate options to convert the Sitka mill. It also ignored the positive preliminary feasibility work and the ongoing full feasibility study. Additionally, it ignored the financing assurances by the owner of APC. In short, the government ignored all work that would allow the conversion to materialize, dismissing it as “inadequate” and postulating that APC owed the government an unwritten duty to continually operate the pulp mill.

In addition, the letter ignored the government’s own evaluation that an MDF mill would qualify as a pulp mill process. The letter mentioned nothing about MDF conversion, but gave APC the prescribed 30 days to submit information that would “show cause” why the contract should not be terminated. The government also admitted that the contract did not explicitly require operation of the pulp mill. It stated that “Section B0.11 *explicitly* requires that a [pulp facility] be *constructed*,” and only by *implication* need the mill be operated for the government to enjoy “employment, economic development, and wood utilization considerations [sic]” bargained for when entering the contract. This

¹¹⁶ Appendix 71.

statement, perhaps more than any other in the letter exemplifies the absurdity of the government's position and posture to terminate. *All* employment, *all* economic development from the saw mill, and *all* wood utilization by APC would be lost when the contract was terminated. If the government decision-makers were truly interested in those benefits for the public, then they would have preserved approximately 1000 jobs from MDF conversion, MDF plant employment, employment in the woods, and APC sawmill employment. The conversion and continuation under the contract would have been facilitated, not blocked with impossible demands and prevented at every juncture as it was under the direction of the White House and the Assistant Secretary's office.

Clearly, the direction to send the letter that day came from Lyons' office, with apparent White House "approval." Deputy Regional Forester, Bob Williams, was called by Mark Gaede, Lyons' confidential assistant, with the direction to send the letter that day, and not to wait another day. The timing and White House involvement in the termination was documented in an e-mail from Williams about the call from Lyons' office:

IT IS OK TO SEND THE LETTER - HE [Gaede] SOUNDED MILDLY SURPRISED WE WERE PLANNING TO WAIT UNTIL TOMORROW.

HE EMPHISIZED [sic] THAT THIS HAS INVOLVEMENT OF WHITE HOUSE AND ESPY. . . .

I RECONFIRMED TWO MORE TIMES THAT IT WAS OK FOR US TO SEND THE LETTER - HE SAID YES. I ASKED IF IT WAS OK TO SEND TONIGHT - HE SAID YES.¹¹⁷

Clearly, as well, the letter deviated substantially from the text and approach recommended by Barton

¹¹⁷ Appendix 72, January 13, 1994, e-mail from Robert Williams filed on February 4, 1994.

and the Regional office of the Forest Service. After the January 3, 1994, meeting with APC, Lyons, the Forest Service, and staff of Alaska's Senators, "three versions of a notice of breach of contract letter" to APC were "directed" to be prepared.¹¹⁸ Region 10 recommended "use of version #2" of the letter. The briefing explained that all versions gave notice of intent to terminate the contract for material breach, that being failure to operate the pulp mill. They all gave 30 days for the company to remedy by beginning to operate the mill again or to "show cause" why the contract should not be terminated. In addition, all versions acknowledge discussions on the possibility of an MDF conversion. The versions differed in how they deal with the MDF issue.

Clearly, Barton and his regional office advisors were trumped on the two most important aspects that were removed from the final January 13, 1994, letter. First, there was absolutely no discussion of the MDF conversion. Thus, the facilitative verbiage was omitted.¹¹⁹ Second, there was no discussion of potential shortfalls in future timber supply, concerns that were real in the mind of Barton and the Chief of the Forest Service. The company had repeatedly requested assurances that the government could meet its annual timber supply contract commitment, so that APC would know that its substantial investment in new MDF pulping equipment could be fully and properly amortized

¹¹⁸ Appendix 73, January 3, 1994, "Briefing - Alaska Pulp Corporation Contract"

¹¹⁹For example, the draft recommended by Barton stated, "I do appreciate the discussions we have had regarding the potential for converting the existing Sitka mill to medium density fiberboard (MDF) production and your interest in a process for considering MDF conversion as a solution to the mill shutdown and its consequences. If APC wishes the government to consider conversion to MDF production as a basis for averting termination, APC must submit a specific detailed written proposal with supporting documentation to me as soon as possible . . . "

over the remaining life of the contract.¹²⁰ Further evidence the Department of Agriculture and the White House were directing the contract APC decisions is the fact that the Regional Office communication plan notifying interested parties about an APC contract decision was taken over by the USDA communications office in Washington, D.C.

In spite of the January 13, 1994, “show cause” letter, APC still attempted to take a proactive approach on January 20, 1994, by providing assurances and information to Assistant Secretary Lyons as requested in the January 3, 1994, meeting.¹²¹ The company laid out a timetable of six months to complete the needed feasibility and engineering work, at which time purchase orders for equipment would be issued. The company requested a reaction from the Assistant Secretary to the Ishiyama letter giving assurances on financing the conversion. The company broached the idea of a six month stipulation whereby the government would withhold its six month offering schedule (an obligation due under the contract), pending the outcome of the MDF feasibility work.

The requests and points in the Roppel letter were reinforced by APC representatives who met on January 21, 1994, with Will Stelle of the White House, Rhea Moore of OGC, and Adela Backiel (Lyons’ deputy). APC was instructed to submit any proposals that it may have regarding the “show cause” letter to Barton.¹²² The USDA counsel in Washington, D.C., Rhea Moore, drafted written

¹²⁰ Thus, verbiage that would have helped APC assess the reality of the timber supply was stricken: “In determining whether to invest capital in MDF production, APC cannot expect the government to guarantee against the risk of possible changes in future timber supply for the Tongass National Forest. . . . The allowable sale quantity for the Tongass will remain subject to change upon completion of the ongoing Tongass Land Management Plan.”

¹²¹ Appendix 74, January 20, 1994, letter from Frank Roppel to James Lyons.

¹²² Appendix 75, January 21, 1994, e-mail from Robert A. Maynard to M. Barton.

responses from Lyons to the Ishiyama January 11 letter and the Roppel January 21 letter that “refer this matter back to you [Barton], the CO [contracting officer].”¹²³ This is evidence of the first juncture where the government actively began to mislead the company into believing that Barton would remain the contracting officer who would actually be the decision- maker on the APC contract issue. When the Ishiyama letter was finalized and sent on January 24, 1994, , it said exactly that:

The Contracting Officer for the United States, Regional Forester Mike Barton, responded to Alaska Pulp Corporation’s October 21 and 22, 1993, letters . . .

[A]ny specific proposal which APC wishes to make should be submitted to Mr. Barton within the time described in his letter. . . .

[The issues raised are] for Mr. Barton as Contracting Officer to decide. You can expect Mr. Barton to consult with my office and that of the Chief of the Forest Service in reaching determinations regarding the present APC breach. However, please contact Mr. Barton or his staff directly regarding contract matters.¹²⁴

This letter is perhaps the most misleading communication that advanced the prospect of termination. While fully and actively engaged in making multiple recommendations to his White House superiors, while actively engaged in directing decisions about the draft APC contract letters (including timing and content) to advance termination, while being fully aware that reasons well beyond APC’s actions for terminating the contract (such as Tongass land plan revisions that would likely prevent the government from meeting its timber supply commitment), and while apparently telling fellow staff that he had “decided” to inform APC that they had “breached the contract,” Lyons purposefully and misleadingly signed a letter that told the company Barton would make the decision on APC and Lyons’ only role

¹²³ Id.

¹²⁴ Appendix 43.

would be consultation concerning those decisions. The government was not truthful with APC, and those well above the contracting officer were driving the APC contract toward termination.

APC still continued to comply with Lyons's request and forwarded 50 pages of answers, material, and analysis on the issues needed to more fully evaluate the MDF conversion to Barton on February 1, 1994.¹²⁵ The comprehensive submission compiled much of the MDF information collected at that time and discussed the company's intention to proceed with MDF conversion by issuing purchase orders for equipment when the engineering and feasibility work was completed, which is a reasonable business practice. This package gave details that would be required to assess APC's commitment to proceed with MDF pulp conversion. The evaluation process was well along, and the commitment level for the conversion was substantial given that stage. APC requested that Barton withdraw his notice of breach "show cause" letter for six months while APC completed its due diligence work from a business perspective.

While Lyons directed APC to Barton for submissions, he also engaged to influence the Secretary's Chief of Staff, Ron Blackley, in a misleading manner about APC's intentions to convert the pulp mill to an MDF pulp process. In his February 3, 1994, briefing to Blackley, Lyons omitted, minimized, or misrepresented facts that showed APC's work and commitment on completing an MDF conversion in a way that obscured the legal position of the government and the viability the MDF conversion. This may be because he was uninformed of the facts, but it is difficult to speculate as to the motivation.

¹²⁵ Appendix 76, February 1, 1994, letter from Frank Roppel to Michael Barton (exhibits omitted due to length) and supplement dated February 12, 1994.

Meanwhile, Rhea Moore and Bob Lenn drafted a February 4, 1994, reply to the February 1, 1994, APC letter for Mike Barton that denied the APC proposal for a six month extension.¹²⁶ The day prior, phone notes taken by Barton indicate that at 1:30 P.M. Backiel, Schnoor, Unger, Hessel, Moore, and Blackley met and discussed White House interest in the APC contract matter.¹²⁷ The Department of Justice was comfortable with the rejection, according to the electronic mail message to Barton from Maynard, but the final product was to be approved by Adela Backiel, Lyons' deputy. The February 4, 1994, Barton letter prompted an even clearer reply from Ishiyama on February 8, 1994.¹²⁸ Ishiyama wrote that "[a]lthough I thought Mr. Roppel's letter was clear . . . I wish to state unequivocally that we will convert the Sitka mill to an MDF plant providing there is no serious flaw in the ongoing feasibility study." That was the clearest statement possible, given the stage of APC's rapid business planning and evaluation. Ishiyama explained that "responsible and prudent business practice" required six months to make a full evaluation.

The close level of cooperation between non-party lobbyists for environmental groups and government insiders and lawyers about the APC contract termination is apparent based on the Sierra

¹²⁶Appendix 77, February 4, 1994, letter from Michael A. Barton to Franklin C. Roppel and e-mail message from Robert A. Maynard to Michael A. Barton.

¹²⁷ Deposition of Kim Schnoor, November 9, 1999, page 223. Barton's handwritten notes (Appendix 77-A) indicate an 8:30 AM conference call with [Kathleen] Morse, Perry, Maynard, Backiel, Schnoor, Unger, Hessel, Moore, and Blackley. Barton's notes indicate that "issues beyond mill closure, i.e., timber supply" were discussed related to the termination. Schnoor said she wanted to deny the 6 month extension and that Barton's February 1, 1994, letter "said nothing." Barton's notes also clearly indicate that the White House wants to respond quickly.

¹²⁸ Appendix 78, February 8, 1994, letter from George Ishiyama (Tokyo) to Michael A. Barton.

Club Legal Defense Fund, Inc., rebuttal to the Ishiyama letter which was sent *just two days after the Ishiyama letter*.¹²⁹ To even have possession of the letter within two days shows inside access to information, but to have responded shows real coordination. The thrust of the letter *assumed* operation of the mill was required by the contract, even though the words of the contract did not say that the mill must be operated continuously, and restated repeatedly the conclusion that such a breach could not possibly be cured.

On the same day, February 10, 1994, APC responded to the January 13, 1994, notice of breach, “show cause” letter.¹³⁰ In eleven pages, APC painstakingly explained their legal position and the fact that it had not repudiated the contract. APC explained to the government what a federal judge would explain again six years later when granting summary judgment to APC. The company had not breached a material provision of the contract, because no words in the contract required continuous operation. It explained that the company had properly invoked the *force majeure* clause of the contract, and it explained the impossibility of meeting the commercially unreasonable “cure” deadline. It also presented evidence obtained through the Freedom of Information Act that special interest groups were “urging the government to use the shutdown as an excuse to terminate the contract,”¹³¹ a fact that became more evident as the records for this oversight project were reviewed.

With the February 15, 1994, deadline still in place, Representative Don Young and Senator

¹²⁹ Appendix 79, February 10, 1994, letter from Thomas S. Waldo and Eric Jorgensen to Ms. Rhea Moore.

¹³⁰ Appendix 80, February 10, 1994, letter from William F. Martson, Jr. to Mr. Michael Barton.

¹³¹ *Id.* at 4.

Ted Stevens wrote to the Assistant Secretary and Regional Forester Barton, respectively, urging support for the APC MDF conversion on the merits.¹³² Stevens warned Barton that the “legal exposure faced by the government by terminating the contract is substantial.”¹³³ Two additional submissions were sent to Barton by APC. On February 12, 1994, Barton was again notified that if the contract was terminated, APC operating line of credit would be in default.¹³⁴ On February 11, 1994, further details of APC’s numerous staff efforts in furtherance of the company’s work on the MDF conversion were detailed.¹³⁵ However, the lobbying efforts of the “green” groups were still being felt well above the contracting officer. On February 13, 1994, TJ Glauthier of OMB sent documents forwarded to him by Nicholas Lapham of the NRDC to his staff (Mark Wheatherly and Ruth Saunders) with the following message:

You may already have this but just in case . . .
It’s about time for the final action on the Tongass—is it all on tract for cancellation of the contract? If not please let me know. TJ¹³⁶

In TJ’s mind, with his handwriting as evidence, the termination had already been set. Thus, it was not the contracting officer who was pushing for the final action on the APC contract cancellation at the

¹³² Appendix 81, February 10, 1994, letter from The Honorable Don Young to Honorable Jim Lyons; and February 11, 1994, letter from The Honorable Ted Stevens to Mr. Michael Barton. Interestingly, the letter from Senator Stevens ended up being circulated to the current lead trial council litigating the APC claim, Jane V., probably Jane Vanneman, a DOJ litigator, indicating that the United States fully expected litigation if it were to make the decision to terminate.

¹³³ Id.

¹³⁴ Appendix 82, February 12, 1994, letter from George S. Woodbury to Mr. Michael Barton.

¹³⁵ Appendix 83, February 11, 1994, letter from Frank Roppel to Mr. Michael Barton.

¹³⁶ Appendix 84, February 13, 1994, Rout Slip and attachments to Mark, Ruth from TJ.

critical juncture, it was the OMB at the behest of the “green” lobby. The Glauthier message was that if the decision to cancel the contract was off track, he would engage to get it back on track for cancellation.

On February 15, 1994, with all the material submitted by APC, the company and Barton entered an agreement that allowed Barton up to two months to review the situation and material and issue a decision regarding the contract.¹³⁷ The time was needed so that a decision would at least appear considered. There was little or no correspondence and communication from the company to Barton from that point until the termination was issued. The document flow shows an interesting decision-making process by which Barton as contracting officer clearly had his thoughts and judgment on the termination issue overruled by his superiors.

By March 25, 1994, Barton had completed a draft analysis of the options and had written a triple-spaced 39 page options paper.¹³⁸ The three options considered by Barton were (1) terminate the APC contract, (2) grant APC’s request for a 6 month extension, and (3) suspend the contract for 2 years. Barton considered the facts, the strengths and weakness of each option, and the consequences possibly resulting from each option. Barton made his “recommendation” as follows:

I recommend that APC be granted the requested extension of six months to complete a feasibility study for the installation of an MDF facility at Sitka subject to the conditions enumerated in Sec. 2.3.

In coming to this recommendation, I considered the arguments for termination. To accept them seems to require a repudiation by the government of the purpose of the contract: year-round

¹³⁷ Appendix 85, February 15, 1994 letter from Michael A. Barton to Mr. George Woodbury.

¹³⁸ Appendix 86, March 25, 1994, options paper by BARTON, Doc. Name 940307 1446RF 2450 MAB.

employment, economic stability, and wood utilization. Further, they seem inconsistent with the goal of providing rural economic development while protecting the environment and avoiding adverse impacts of federal actions on minorities. Even if the government has a right to terminate the contract, it has the discretion not to do so if a different alternative better serves the public interest.

Some suggest that the contract should be terminated because it causes forest mismanagement and environmental harm. While this reflects the disagreement over how the Tongass should be managed that began in the 60's, and will continue regardless of this decision. A number of reviews . . . have not found a basis for these allegations. Some might argue that by the very passage of TTRA, Congress itself determined that there was substance to these allegations; yet this act maintained the contracts, though significantly modified.¹³⁹

However, by the time Barton's paper was sent to Chief Thomas in Washington, one option was eliminated (the option to suspend the contract for two years), as was Barton's written "recommendation" to grant the six month extension.¹⁴⁰ The records show that Barton did make that oral recommendation to Chief Thomas, who documented it in a handwritten note to Adela Backiel, Lyons' deputy: "Mike recommends that we go with the 6-month extension as APC may not be able to go ahead."¹⁴¹

In fact, Thomas' journal entries on March 22, 1994, during his trip to Alaska where he discussed Barton's view of the situation, verify Thomas' fear about government's ability to "meet the contracted levels of wood supply." Thomas believed that a six month extension would better position APC to hold the government responsible for breach of contract, because there is a good chance within

¹³⁹ Id. at 37-38.

¹⁴⁰ Appendix 87, "DRAFT-COMBO-MODIFIED" Options Paper with cover note to Sue and separate note to Adela [Backiel] from JWT [Jack Ward Thomas].

¹⁴¹ Id. Appendix 87, handwritten note to "Sue"[Secretary for Jack Ward Thomas] from Mike Barton and handwritten note to Adela [Backiel] from JWT [Jack Ward Thomas].

such a six month period that timber harvest levels would be reduced on the Tongass.¹⁴² After Thomas reflected about that point, he candidly disclosed in that journal entry that “[w]e will meet in Washington next week to make the promised decision.” The locus of the APC decisions had clearly moved from Alaska to Washington, D.C., where the merits of APC’s position under the contract received minimal consideration at most.

The first possible decision meeting, which is *only* noted on Adela Backiel’s calendar and appears referenced in no other place in any records produced to the Committee, took place on March 29, 1994.¹⁴³ This meeting was set for 90 minutes, and according to Backiel’s schedule, the following were in attendance: “Mike Barton, Jim [Lyons], Adela, Rick [Grand], David Cohen, Jane Banneman [probably Vanneman], Jack [Thomas], Grey Reynolds Jim’s office.” It is noteworthy that there was no other record—no meeting notes, follow-up memos, journal entries, or other documents—from this meeting. It did not appear on Jim Lyon’s schedule, and while he routinely took copious notes at meetings, his entire log that was produced to the Committee contained no entries about APC between November 15, 1993 and the April 11, 1994. There is also no confirmation that Barton, who was stationed in Alaska, attended the March 29 meeting in person or by phone. No meeting notes were produced by Department of Justice lawyers, David Cohen or Jane Vanneman, about this meeting, even though all records related to the APC contract termination were subpoenaed from the Department of Justice and Attorney General Reno. No other Service or Department records

¹⁴² Appendix 9, Thomas journal notes page 4.

¹⁴³ Appendix 88, Adela Backiel schedules. It should be noted as well that Backiel’s calendar notes several other priorly undisclosed APC meetings. (e.g., Rick Grand on April 4, 1994, one hour APC conference with undisclosed parties on March 1, 1994).

related to this meeting were produced and no testimony in any of the depositions for the Court of Claims action referenced the meeting.¹⁴⁴ It is remarkable, that so many people attended such a meeting about the contract termination that had attracted the attention of officials five levels higher than Mike Barton, yet no evidence about the meeting exists—except this schedule reference of Ms. Backiel.

The decision meetings only began on March 29, 1994, and while there is no independent verification that Barton attended or participated in that meeting, he did not attend or participate in any APC decision meetings in April 1994. Chief Thomas kept Barton apprized on at least two occasions of the decision-making status. Clearly, Barton had no role in the decision-making process beginning in April. His last possible role was that described in Thomas' note to Adela Backiel conveying Barton's "recommendation," which was probably forwarded to Backiel for the March 29, 1994, meeting. However, the product of Barton's judgment was not the decision to terminate. Barton's deposition testimony confirms Thomas' account of Barton's role, as does the outcome of the Washington, D.C. exercise to terminate the APC contract:

- Q: Is it true that the [termination] letter sets forth all of the reasons you had in mind at the time you decided to terminate the contract?
- A: I did not terminate—I didn't decide to terminate the contract.
- Q: Who did?
- A: I don't know?
- Q: Why don't you explain that? Why is it that you don't know?
- A: I was instructed—I implemented the decision to terminate the contract. The chief told me to terminate the contract. I don't know whether he made the decision or somebody

¹⁴⁴ It is unknown whether this record of Ms. Backiel's schedule was produced in the civil litigation, and if it was not, what grounds it was withheld. Questions concerning other records that were produced for the civil litigation indicating meeting times and dates did have questions framed around them for Ms. Backiel and the other participants.

else.¹⁴⁵

From the moment Barton's "recommendation" was forwarded to Thomas until the decision to terminate the contract was made in Washington, D.C. by a cast of Barton's superiors, Barton was not involved with making judgments on the merits of the record submitted by APC and not involved in issuing a decision that was the product of his judgment as the contracting officer. The Contract Disputes Act, which places a designated government decision-maker in the position of evaluating and *deciding* government contract matters, did not envision this dynamic. It was designed to ensure fairness to parties in business dealings with the government.

At no time did Lyons' remedy the deception that *Barton* would *make* the decisions on APC's contract, and that the role of Barton's superiors was limited to *consultation*, even though Barton was effectively out of the decision-making chain. That deception was first initiated in Lyons' January 24, 1994, letter to Ishiyama that confirmed Barton's role as contracting officer. At no time was APC informed by the government that anyone other than Barton, as contracting officer, would be in control of the decisions on the APC contract or that submissions should be made to anyone but Barton.

This was unfair to Barton, because it essentially made him a front man for a costly decision made by his politically appointed superiors. It was unfair to APC because APC's management was left with the false impression that Barton had the authority, the capacity, and would actually make the decisions on APC contract matters as the contracting officer. It was bad for the government, because it was a misleading way to do business and conduct a fair evaluation of an issue about a government

¹⁴⁵ Deposition of Michael A. Barton, Vol I, page 11-12.

commercial relationship. Essentially, the Lyons, Backiel, Glauthier, and perhaps the Secretary used Barton in a way the Contract Disputes Act and Forest Service contracting practice never envisioned. He was their foil, a means for them, as political appointees, to avoid or deflect responsibility for their actions, judgments, and the result of their decision to terminate the APC contract.

Even more troubling is the fact that the decisions made above Barton would subject the United States to a huge liability for breach of contract, and there was *no internal written legal analysis justifying their position* that APC had repudiated the contract because the pulp mill was not operating. In fact, Rhea Moore, the USDA OGC attorney testified in her deposition that there was not a single or definitive legal opinion prepared by her office on whether the company had to operate the Sitka pulp mill continuously.¹⁴⁶ Lyons, while not an attorney, had very detailed knowledge about the precise wording in the contract that would form the basis of the government's position. He explained this to Ron Blackley, Secretary Espy's Chief of Staff on February 3, 1994.

While the contract does not contain express terms requiring operation of the pulp mill, it is the view of the Office of General Counsel, USDA, and the Civil Division, Department of Justice that the history and contractual language will support the position that operation of the pulp mill is required.¹⁴⁷

If that indeed was the view by the Department of Justice and other lawyers, nowhere was there a written basis or a legal analysis supporting that view. Perhaps the true decision-makers did not worry about the eventual implications of a decision to terminate without a solid legal basis, because it would look like Barton was responsible for the decision. The scheme used Barton and severely

¹⁴⁶ Deposition of Rhea Moore, December 15, 1999, page 133.

¹⁴⁷ Appendix 89, February 3, 1994, Briefing Memorandum for Ron Blackley from James R. Lyons.

disadvantaged APC by misleading its management into believing that submissions to Barton could shape his judgment, and possibly produce a satisfactory outcome of their contractual situation. Their submissions did shape Barton's judgment, but that did not matter to the outcome because a group of Barton's superiors made the decision to terminate. When asked if he would have issued a letter terminating the contract had he not been instructed to do so, Barton replied: "No I wouldn't have canceled the contract."¹⁴⁸ But data that led him to that result was not submitted by APC to the true decision-makers and did not get processed by them in the meetings that took place between April 7, 1994, and April 14, 1994, when the contract was terminated. This was a true Clinton-Gore big government deception, Clintonisqe in character, Gore-like in result, all with a shallow and inadequate legal basis.

D. How Termination Happened: Sorting Out the \$750,000,000 Decision

There appear to be several decision points and possibly two reversals of the APC contract matter after the March 29, 1994, meeting, none which Barton participated in. The sequence starts with an "URGENT " memorandum on April 4, 1994,¹⁴⁹ from Lyons to Kim Schnoor. The memorandum shows Lyons' deep role in the APC decision-making, his view that the Secretary would be required to make a decision, and the fact that he knew Alaska's Senators were scheduled to meet with the Secretary on April 11 to press for a decision to allow the MDF conversion to proceed:

This memorandum is intended as a "heads up" for a number of issues that are coming to closure and *will shortly require a decision on the part of the Secretary*. I am concerned about the

¹⁴⁸ Deposition of Michael A. Barton, Vol I, page 12.

¹⁴⁹ Appendix 90, April 4, 1994, Memorandum to Kim Schnoor, Counsel, from James Lyons, Assistant Secretary, (document number (Path:100756/NYMA/Kimmemo)).

timing of several of these, but legal considerations largely limit our options. In the interest of assuring adequate time for the Secretary to consider each, and to permit further review by the White House (if necessary or warranted), I am bringing these issues to your attention today. (Emphasis supplied)

Decision memos will soon follow this informational memo. I am prepared to brief you and the Secretary anytime this week **except Wednesday**. (Emphasis in original)

* * *

Now APC seeks a further extension (6 months) to fully develop their MDF proposal. There are important legal and political ramifications to the decision to be made by the contracting officer—Regional Forester Mike Barton—that the Secretary needs to be aware of. He is meeting the Alaska Congressional delegation on Monday, April 11, regarding this decision. They, and Governor Hickel, are pressing hard for the extension. He needs to be full appraised on the situation and consequences of the decision prior to that meeting and Mr. Barton's decision.¹⁵⁰

Thus, according to Lyons, a host of issues required decisions by the Secretary, and one of those issues was the APC contract termination. It is interesting that Lyons presents the decision as one that Barton will make, but that Barton is entirely out of the decision-making process at that point and Barton's recommended decision was to extend the contract to give APC time to complete feasibility work.

On the same day, April 4, 1994, Lyons already had in his possession two versions of decision letters about the APC contract that he requested from Perry.¹⁵¹ The letters and cover memo from the USDA Office of General Counsel were copied to Backiel and Thomas, but not to Barton, even though they were prepared for Barton's signature. The memo clearly reveals Lyons was asserting control of the APC contract decision-making process:

¹⁵⁰ Id.

¹⁵¹ Appendix 91, April 4, 1994, memo for James Lyons from James Perry, Acting Associate General Counsel, USDA, and accompanying letters.

Attached per *your request [Lyons' request]*, and *ahead of schedule*, are two draft letters relating to Alaska Pulp Corporation's (APC) long-term timber sale contract. The first draft letter terminates APC's contract based upon APC's indefinite closure of the Sitka pulp mill. The second draft letter defers a decision to terminate APC's contract until after completion of APC's medium density fiberboard feasibility study. This second draft includes conditions to which APC would be required to agree before the Forest Service would agree to extend the contract.¹⁵² (Emphasis supplied)

This memo and the draft letters (April 4), make sense on the heels of the March 29, 1994, meeting noted on Backiel's calendar, because the options pending at the time (under Barton's triple-spaced analysis—termination or extension) were those described by Perry in the cover memo. What the Perry memo adds is verification that *Lyons requested preparation of the letters* by USDA lawyers, and that he set the time frame which was achieved.¹⁵³

Then on April 6, 1994, Lyons finished his "briefing" memo to the Secretary.¹⁵⁴ He discussed two options under consideration—terminate or defer the decision for six months. It is unclear whether that memo ended up as part of the package he referenced in his April 4, 1994, urgent memo to Kim

¹⁵² Id.

¹⁵³ A very odd fact about the April 4, 1994, Perry memo produced to the Committee concerns two attachments. Both were labeled in the top left corner—one as "ATTACHMENT #1" and the other as "ATTACHMENT #2." However, these draft letters are actually two versions (dated 1-6-94) of the January 13, 1994, letter to APC that notified APC the government viewed the closure as a breach of contract. They do not fit the description of the attachments in the Perry memo. However, other letters separately produced by the USDA do fit this description—as to the designation at the top of the letter, the content, and the context of the text of the letters that were said to be attached to the Perry memo. Those letters are also printed in the same type face as the Perry memo, and they are captioned identically to the subject of the Perry memo. These letters were also separately produced attached to the Perry Memo and are contained in Appendix 91 as the attachment to the Perry memo. The draft of the termination letter was very similar to the one actually sent ten days later, but not identical.

¹⁵⁴ Appendix 92, April 6, 1994, briefing memo from James Lyons to Secretary Espy.

Schnoor.¹⁵⁵ That package, also dated April 6, 1994, contained two “Decision” memoranda associated with Tab 1 (Pacific Northwest Plan) and Tab 2 (Grazing).¹⁵⁶ However, there was no memorandum–background or decision–concerning the APC contract attached to the records produced to the Committee. This is odd, because Lyons noted to Schnoor in the April 4 urgent memo that “[d]ecision memos will soon follow this informational memo” on all of the issues–the Pacific Northwest Plan, Grazing, *and* the APC contract.

The draft letters described by Perry in his transmittal were referenced as attached to Lyons’ April 6, 1994, briefing memorandum for the Secretary. The first draft would accomplish termination--what Lyons had three months earlier “recommended” to his superiors at the White House. In writing, Lyons told Stelle on January 10, 1994, and McGinty on January 11, 1994, that he would proceed with termination of the contract regardless of APC’s submissions. The second draft would be a six month extension with conditions, Barton’s recommendation. It is equally clear from the Rick Grand to Steve Brody memorandum that the White House had priorly been involved in APC decision-making at critical junctures, including “approving” the January 13, 1994.

With the submissions to the Secretary on the decision, the following day, April 7, 1994,

¹⁵⁵ Appendix 93, April 6, 1994 package of material containing three tabs (TAB#1 Pacific Northwest Plan; TAB #2 Grazing, and TAB#3 Alaska Pulp Co.) There was no memo attached to the production to the Committee concerning APC, even though the table of contents specify that tab 3 contained APC material; clipped to the back of the package was a four page document entitled “United States Contract with the Alaska Pulp Company.” This appears to be the agenda for background purposes for the April 11, 1994, meeting that was scheduled to occur between the Secretary and Alaska’s Senators. This document does not appear to be in the form of a decisional memoranda.

¹⁵⁶ The April 6, 1994, package was contained only in records produced from the files of Kim Schnoor and did not include a decision memoranda regarding APC attached.

at 1:00 P.M., the decision-making about solidifying the APC contract termination continued in Washington, D.C., when Jim Lyons, Adela Backiel, and Jack Ward Thomas met about the APC contract situation.¹⁵⁷ Lyons' testimony is that Backiel, Thomas, and he were "all in agreement about the recommendation for termination" at an April 7 meeting.¹⁵⁸ This is an odd characterization, given that Barton, a subordinate of Lyons three levels down would supposedly *make* the decision whether or not to terminate, and that Barton himself had openly and candidly made the "recommendation" to defer the decision for six months. Lyons explained in his deposition testimony that his April 7, 1994, meeting with Backiel and Thomas was followed on the same day with an impromptu meeting with the Secretary who then made the first decision to terminate APC's contract. His testimony is as follows:

Q I believe you had indicated that although this meeting between Jack, Adela, and Jim, APC [on April 7, 1994] as stated in your calendar, was in your office, there may have been a meeting with the Secretary that day?

A Yes. . . . As I recall, there was a meeting on Thursday April 7th, between Jack, Adela and myself in my office to discuss the status of issues and options and recommendations for Secreatry Espy.
Then I believe—I believe it would have been that day, I am not exactly sure, but I believe that then we had a meeting with the Secretary . . . In which we discussed with the Secretary the options and issues, and offered our recommendation.

Then I believe a decision was rendered.

* * *

Then the meeting with the delegation was requested by the delegation for the succeeding Monday, the 11th, I believe.

Thomas' journal notes confirm a decision some time prior to Sunday, April 10, 1994, by a

¹⁵⁷ Appendix 94, Lyons' schedule.

¹⁵⁸ Deposition of James Lyons, Vol. I, October 29, 1999, page 109.

group consisting of Lyons, Backiel, Schnoor, the Secretary, and a lawyer from OGC,¹⁵⁹ probably Moore. The meeting to which Thomas refers may be an April 7 meeting as indicated on Lyons' schedule and referred to by him in his deposition.¹⁶⁰ Schnoor had no recollection of an APC contract meeting at which the Secretary was present prior to April 11, 1994.¹⁶¹ While Thomas puts Espy at the first decision meeting and credits him with agreeing to the decision to terminate as recommended by the group, Schnoor did not view the April 11, 1994, meeting as a decision meeting,¹⁶² and did not recall any other meeting:

I recall one meeting where the issues were discussed, where the two options were presented and then after that meeting, the Secretary's meeting with the Senators, but I do not recall there being a decision made in the meeting prior to the Secretary's meeting with the Senators.¹⁶³

In preparation for that meeting she recalled there being "a general discussion," not a decision and perhaps not a unanimous staff recommendation to terminate. At her deposition, after reviewing the April 6, 1994, memorandum to the Secretary from Lyons, Schnoor testified that she was not aware of a decision having been made prior to the April 11, 1994, meeting with Alaska's Senators.¹⁶⁴

¹⁵⁹ Appendix 9, Thomas journal notes, page 10.

¹⁶⁰ Indeed Lyons says that the April 10, 1994, Thomas journal entry refers to the April 7th meeting between Lyons, Backiel, and Thomas.

¹⁶¹ Deposition of Kim Schnoor, November 9, 1999, page 193.

¹⁶² *Id.* at 196.

¹⁶³ Deposition of Kim Schnoor, November 9, 1999, page 195-197.

¹⁶⁴ Deposition of Kim Schnoor, November 9, 1999, page 173.

While there are varying accounts of Espy's attendance at a decision meeting,¹⁶⁵ a decision was made in the minds of some with or without Espy, and certainly without Barton prior to the April 11, 1994, meeting with Alaska's Senators. Lyons was orchestrating the sequence and interface with the Secretary through Schnoor. His April 6, 1994, briefing memo to the Secretary outlined the two options and attached the decision letters he had already directed to be prepared.¹⁶⁶ In all likelihood, the first decision or "recommendation" was made at the *meeting in Washington, D.C. on April 7* by Lyons, Thomas, Backiel, and perhaps Espy, if Thomas' journal notes and Lyons recollection are correct.¹⁶⁷ The record suggests that Lyons was attempting to ensure the Secretary's position in favor of termination prior to the meeting between the Secretary and Alaska's Senators, a position inconsistent with his representation to Schnoor three days earlier (in the April 4, 1994, urgent memorandum) that Barton would actually make the decision on APC's contract. In fact, Lyons was undercutting from within the highest levels of USDA the decision that would have been rendered by the contracting officer.

With the Lyons, Thomas, Backiel "recommendation" in place, or if Thomas' account is

¹⁶⁵ Kim Schnoor's deposition testimony substantiates only two meetings with the Secretary on the subject—both of which occurred on April 11—one with Lyons, Backiel, Thomas, and OGC present to prepare for the meeting with the Alaska Senators, and the actual meeting with Alaska Senators.

¹⁶⁶ Appendix 92, April 6, 1994, memorandum for Secretary Espy from Assistant Secretary James R. Lyons. Lyons also mentioned in his April 11, 1994, weekly report to the Secretary that the "Forest Service Contracting Officer must issue a letter to APC by April 15 indicating that APC has successfully remedied their contract breach or shown cause as to why the contract should not be terminated." (Appendix 93-A)

¹⁶⁷ On April 8, 1994, Ruth Sanders of OMB confirmed in an e-mail to Ron Cogswell and Mark Weatherly that TJ Glauthier had been consulted about the decision, which was to presumably terminate, and that the announcement would be made on the 13th or 14th of April. (Appendix 94-A).

accurate, with the Secretary agreeing to the group “recommendation” to terminate, all that remained to possibly reverse the decision was the priorly scheduled meeting for April 11, 1994, with Alaska’s Senators. It is very interesting that none of the analysis or material prepared by Lyons or submitted to the Secretary mentioned, analyzed, or accounted for the submissions by APC on February 1, 1994, or the submissions Barton found persuasive in reaching his decision to grant APC six additional months to complete its feasibility work.

On April 11, 1994, Lyons’ schedule indicates a 4:30 P.M. briefing for Secretary Espy about the APC contract, followed by a meeting with the Secretary and the Alaska Congressional delegation about the APC matter. Barton did not attend either meeting and was in Alaska at the time. Lyons, Thomas, Schnoor, a lawyer from OGC, and others attended as well. At the meeting, Alaska’s Senators made historical and substantive presentations about the merits of the MDF conversion and the substantial risks of terminating the contract. Thomas’s journal notes recount the meeting and indicate that at its conclusion, the Secretary departed with Kim Schnoor, his counsel, to a private office. When she returned later, Thomas recounted, Schnoor told the group that the Secretary had “reversed” the prior decision to terminate and directed that APC be given four additional months to complete the feasibility study for the MDF conversion.¹⁶⁸ Schnoor testified that Thomas may have interpreted part of

¹⁶⁸ Schnoor testified that she came back into the room and informed them that the Secretary wanted to fully explore all options, including ensuring . . . one, that he wanted further information from the Office of General Counsel about protecting the legal interests of the USDA government legal interest relative to the contract. He wanted to know what programs were available to address the concerns that had been presented by the Senator for the residents of Sitka, Alaska. Finally he wanted further exploration of the MDF facility. These were the points that I recall him raising, what he wanted further information on before the Department took further action and me directing—I remember Jack being there and Adela being there and Rhea being there, and me directing them to go back and get that

her instruction from the Secretary—to look at the feasibility of MDF—as “giving them a four month extension.”¹⁶⁹ But Schnoor was clear that in no prior meeting had the Secretary made a decision, so he could not have reversed his decision. Barton’s deposition testimony confirms the status of the decision in Thomas’s mind at that time: Barton testified that on Tuesday, April 12, 1994, he was in Ketchikan and was “informed by the chief that it looked like the decision was going my—what I wanted or something like that.”¹⁷⁰ This conversation was the day after the meeting with Alaska’s Senators, and the Secretary’s direction was still outstanding.

Lyons testimony is that after the meeting with the delegation, “I think Secretary Espy, I guess, wavered, if you will, and began to reconsider his decision”¹⁷¹ to terminate. Lyons also said that it was after the April 11, 1994, meeting with Alaska’s Senators that he met with the Secretary and Kim Schnoor, to

revisit the issues and the Secretary’s decision what our recommendation was, which then led to not a decision in that room by Secretary Espy, but a succeeding phone call to me from Kim Schnoor saying the secretary has decided to terminate and move on.¹⁷²

done in a prompt fashion, as in immediately.”

¹⁶⁹ Deposition of Kim Schnoor, November 9, 1999, page 204.

¹⁷⁰ Deposition of Michael A. Barton, November 12, 1999, page 132. Barton’s decision or “recommendation” had been a six month extension to allow APC to complete its feasibility work and advance the MDF conversion project.

¹⁷¹ Deposition of James Lyons, page 121.

¹⁷² Id.

Lyons' weekly report for the week of April 18, 1994, (written and turned in late the prior week)¹⁷³ references the April 11, 1994, meeting and confirms the status of the decision after that meeting.¹⁷⁴ The weekly report entry was obviously written after the Monday meeting with the senators and after the apparent reversal or request by the Secretary for more information that would give APC more time to complete their feasibility work. The text was also written prior to the termination letter being sent on April 14, because it shows the decision letter being sent on April 15, the deadline under the stipulation, and it still references the outcome as a deferral, which was not the outcome. Lyons' update to the Secretary was as follows when the report was turned in:

¹⁷³ The weekly report was obviously written prior to Monday, April 18, 1994, and probably on April 13 or 14, 1994. Several references to events that were already held on April 14, were referenced in the past tense, and events that were to occur on April 15, 1994, were referred to in the future tense. Therefore, the report was likely turned in on Thursday, April 14, 1994, but prior to the termination letter.

¹⁷⁴Appendix 95, April 18, 1994, Memorandum for Secretary Espy from James R. Lyons, Assistant Secretary.

[Steve, please contact me before including the following. A decision was not finalized at the time this report was due.]

The Forest Service Contracting Officer issued a letter to APC on April 15 indicating that the Forest Service will defer a decision to terminate the contract until July to allow APC time to complete a feasibility study of converting the current dissolving pulp plant into a medium density fiberboard plant. Conditions were included to which APC must agree before the Forest Service will consent to extend the decision. APC holds one of two Congressionally mandated 50 year timber contracts on the Tongass National Forest in Alaska. On January 13, the Contracting Officer notified APC that they were in breach of this contract due to their decision to close their pulp facility last September. The Alaska delegation met with the Secretary and me on April 11 to discuss this issue.¹⁷⁵ (emphasis supplied)

Lyons' weekly report, when written (perhaps by Rick Grand), was congruent with Thomas' account of the status of the decision (which was to defer the deferral) after the April 11, 1994, meeting with the Secretary. Also telling is the bracketed material indicating that *the decision was still in play* and that the update to the Secretary may be changed, so Lyons (or Grand) wanted to be contacted before the weekly report was actually submitted. This is also an indication that Lyons was in control or directing the outcome of the decision. The April 18, 1994, Lyons weekly report was most likely turned in on Thursday, April 14, 1994, prior to the termination letter being sent to APC from Alaska, but before the close of business Eastern time.

After the April 11, 1994, meeting with the Senators, given the timing of the Secretary's "reversal" (according to Thomas) or his request for three additional information, including MDF feasibility (according to Schnoor), the Secretary's underlings who favored termination (Schnoor, Lyons, Backiel, Thomas, and Moore) were faced with the very practical problem. They needed to get the Secretary what he requested before April 15, 1994, when the APC-Forest Service stipulation expired.

¹⁷⁵ Id.

They needed to keep the decision “on track”¹⁷⁶ for termination, which is what Glauthier at OMB also expected as indicated by his note forwarding environmentalist material urging termination. According to Lyons’ weekly summary, the decision was off of the termination track at that point, and it remained so until at least April 14, 1994. The practical problem was compounded by the fact that Secretary Espy was scheduled to be out of the country for farm trade talks.¹⁷⁷ In fact, Secretary Espy departed almost immediately after the meeting with Alaska’s Senators on April 11, 1994, leaving Andrews Air Force Base at 8:00 PM for Marrakech, Morocco.¹⁷⁸ This means that Espy was out of pocket within an hour after Thomas’ journal reported that Schnoor emerged from the Secretary’s office with a reversal of the prior decision (or prior agreement with the decision) to terminate APC’s contract.

It is difficult to imagine how Assistant Secretary Lyons could have met personally (as he testified) with Espy to discuss the issue with him on the same day as the decision by Espy and the same day as he received the phone call from Schnoor telling him the decision by the Secretary was to terminate. That day was either April 13th (according to Thomas) or 14th, the date that the termination letter was sent. But Espy’s departure against Lyons testimony¹⁷⁹:

¹⁷⁶ “On track” is the term used by OMB’s TJ Glauthier.

¹⁷⁷ Deposition of Kim Schnoor, November 9, 1999, page 180; Schedule of Secretary Espy produced to the Committee; *Journal of Commerce*, “US, Canada Officials Close to Agreement on Farm Trade Meeting Today May end Dispute,” April 14, 1994,

¹⁷⁸ Appendix 95-A, October 18, 2000, letter from Edward McNicholas to Duane Gibson, Committee on Resources forwarding the Senior Federal Travel Form with the manifest listing Secretary Espy as a passenger on the April 11, 1994, flight departing at 8:00 P.M. from Andrews Air Force Base.

¹⁷⁹ Deposition of James Lyons, October 29, 1999, pages 39-43.

Q: Who made the decision to terminate Alaska Pulp's contract?

A: Ultimately Secretary Espy. . . .

Q: How do you recall being informed of the decision?

A: I think it was actually by a phone call.

Q: Who called?

A: Secretary's counsel [Kim Schnoor].

* * *

Q: What did you do at the time you received that information [that the Secretary's decision was to terminate]?

A: I communicated it to Chief Thomas and my deputy.

* * *

Q: What did you tell her?

A: I told her that the Secretary has decided that we should terminate the APC contract.

* * *

Q: Had you met with the Secretary the day that this decision was communicated to you?

A: Yes.

Q: Did you discuss the contract with him on that day?

A: Yes.

Q: Who was present at that meeting?

A: Kim Schnoor.

Q: What was discussed?

* * *

A: Well, let me simply say we discussed the merits as well as the legal issues associated with the termination.

* * *

Q: How long was that meeting?

A: That meeting, I believe, was a brief meeting, half an hour.

Later in his deposition, Lyons explained:

[A]fter the meeting with the delegation, I think Secretary Espy, I guess wavered, if you will, and began to reconsider his decision.

I think it was subsequent to that that I had the meeting with the Secretary and Kim Schnoor that I referred to at the beginning of our discussion, in which we revisited the issues and the Secretary's decision what our recommendation was, which then led to not a decision in that room by Secretary Espy but a succeeding phone call to me from Kim Schnoor saying the Secretary has decided to terminate and move on.¹⁸⁰

Lyons sworn testimony contradicts Schnoor's somewhat. Schnoor testified that the Secretary decided not to intervene in the APC decision.¹⁸¹ Lyons testimony is that the Secretary ultimately made the decision to terminate the APC contract, and Kim Schnoor informed him of Espy's decision by phone.¹⁸² Lyons said he notified Backiel, who then notified Thomas.¹⁸³ While Lyons testified that the day of Espy's decision, he met with the Secretary and Kim Schnoor about the APC contract

¹⁸⁰ Deposition of James Lyons, October 29, 1999, pages 121-122.

¹⁸¹ Deposition of Kim Schnoor, November 9, 1999, page 105-107.

¹⁸² Deposition of James Lyons, October 29, 1999, page 39-40.

¹⁸³ At one point, Lyons says in his deposition that he notified Backiel, then Thomas (page 39) and at another point he testified that after his call from Schnoor, he notified Backiel, who then notified Thomas (page 134).

termination, Schnoor does not recall such a meeting (between April 12 and April 14).¹⁸⁴ Schnoor recalled no separate meeting between Lyons and the Secretary, and recalled no phone call informing Lyons of a Secretarial decision. Schnoor also noted that according to her records, the Secretary left the country at some point after the late afternoon meeting with Alaska's Senators on April 11, 1994, which is now confirmed by the Senior Federal Travel Form for the trip. If there was the meeting between Lyons and the Secretary, subsequent to which Lyons was informed of a Secretarial decision, that meeting most likely occurred after the weekly report was turned in on April 13, 1994 (or April 14 1994), because the change in the decision back to termination would be reflected or there would have been an update to the report. The meeting would have also occurred sometime on or after April 12, 1994, the day following the Secretary's meeting with Alaska's Senators. Lyons says when he learned of the decision by phone, he told Backiel and Thomas. This would mean that he learned of the decision prior to (when Thomas made the call to Barton), which was at 3:00 PM Eastern Time on Thursday April 14, 1994.¹⁸⁵ It was Thomas who then delivered the instruction to Barton. Thomas memorialized the conversation where he gave the instruction in a memo.¹⁸⁶ Barton likewise composed an e-mail regarding the calls he received from Thomas instructing him to send the letter terminating the contract.¹⁸⁷

¹⁸⁴ Deposition of Kim Schnoor, November 9, 1999, page 210.

¹⁸⁵ Thomas' journal notes put the decision on April 13, 1994, so Lyons could have gotten the call from Schnoor on that date, if his testimony is accurate.

¹⁸⁶ Appendix 95-B, April 15, 1994, Memo to the Record by Jack Ward Thomas.

¹⁸⁷ See, Appendix 96-A.

After the Secretarial reversal on April 11, 1994, (according to Thomas) there was apparently an idea of a one month extension for a decision considered.¹⁸⁸ A record produced in *only* one file, the file of Kim Schnoor indicates the April 15, 1994, “deadline” supposedly pushing the decision was no deadline at all. The record is a two page document. The first page is a letter to APC for Barton’s signature saying that he believes a resolution of the situation can be reached by May 15, 1994, and he proposes an extension of the stipulation through that date. The second page is the very simple stipulation extension. Several things are curious about this document. First, is the fact that it exists at all. In the thousands of records reviewed for this report, there were several copies of records found in numerous files of the individuals involved with the APC decision-making. This is the only copy of this record that was produced, indicating that it probably had limited top-level circulation. Second, it was in the files of Kim Schnoor, and in no other files, indicating that the record probably concerned Secretarial interaction sometime close to April 15, 1994,¹⁸⁹ when the APC stipulation with the government was to expire. It being in Schnoor’s files could explain one way that some of those who favored termination perhaps contemplated dealing with the Espy instructions¹⁹⁰ on April 11, 1994, instructions that would *take time* to comply with. This brief extension document would give them the needed time. Third, the fact that it was not produced in Barton’s files, is one additional piece of evidence that the contracting

¹⁸⁸ Appendix 96, draft letter and stipulation extension from files of Kim Schnoor.

¹⁸⁹ The Secretary did receive some weekly written briefings about the APC situation in the context of many other USDA issues, did receive one memorandum on April 6, 1994, but only interacted with Alaska’s Senators regarding it on April 11, 1994.

¹⁹⁰ Appendix 96, *see*, stipulation and letter. Regardless of whether those instructions were as Thomas heard them (a reversal) or as Schnoor remembered them (requests for information).

officer was not in control of the decision-making or perhaps even aware of the forces driving the decision-making, yet the signature block was for him.¹⁹¹ The fact that the stipulation extension exists at all means there was no particular advantage for the government to rush a decision. The April 15, 1994, deadline was an artificial deadline for a decision that was used to drive the desired result of termination.¹⁹² The extension stipulation was not used.

However, on April 14, 1994, or perhaps April 13, 1994, according to Thomas' journal notes), pressure to terminate the contract on that day was exerted by the White House Office of Environmental Policy. The message came through Adela Backiel to Kim Schnoor and was attached to Schnoor's April 14, 1994, notes:

Kim-Katie McGinty's office called to ask for a memo on APC including 1) substance 2) politics & 3) timing. Also she wants to release this tomorrow rather than today. When you talk w/ her could you suggest that if we release today, the talking points might do, or we can get a memo to her later today if we release tomorrow.

Thanks - Adela

Rhea & I still think we should do it today.¹⁹³

Schnoor testified in her deposition that she talked to someone from the Council on Environmental

¹⁹¹ In addition, the boldface heading of the document "DRAFT TERMINATION LETTER:PRIVILEGED AND CONFIDENTIAL" is not at all descriptive of what the body of the letter says, which requests a 30 day extension because "resolution" can be reached by then, which may indicate that the heading and salutation for this record was probably copied from another document regarding termination. Also, the standard Forest Service reply line always included on letters generated by the Region ("Reply to: ____") is not indicated.

¹⁹² For example, Lyons offered this fact as a rationale to proceed in his April 6, 1994 briefing memo to the Secretary and in his April 4, 1994, "heads up" memo to Schnoor. Schnoor offered the deadline as a reason to address the termination (Schnoor deposition, page 127).

¹⁹³ Appendix 96-B, this note was written on a Post-it sticky and placed in Schnoor's notebook on April 14th, but could have been written on the April 13, 1994.

Quality about the Department of Agriculture's decision on the contract, and that she recalled her "frustration and irritation at being directed of [sic] how to complete something relative to timing"¹⁹⁴ of the termination decision. Schnoor's frustration may have also related to the fact that the Secretary was in Morocco, had given one set of instructions or decided not to intervene,¹⁹⁵ and she was being pressed for the final decision.

What is clear about timing is on April 14, 1994, at 3:00 PM Eastern Time, Chief Thomas called Barton to inform him that "now the decision was to terminate the contract" and he was to sign the letter terminating it.¹⁹⁶ Thirty minutes later, Rhea Moore called Barton to tell him to get "on with signing" because the "WHITE HOUSE WANTED IT OUT BY 3PM" and the Secretary had called and "WANTED STEVENS AND MURK NOTIFIED"¹⁹⁷ These messages are a glimpse of who within the Administration was pushing the decision to terminate—and they were those in the White House with little or no information on the specifics or submissions by APC. There was apparently some urgency to get the letter signed by Barton because Rhea Moore called again 15 minutes later with the repeated

¹⁹⁴ Deposition of Kim Schnoor, page 113.

¹⁹⁵ Schnoor testified in her deposition that the Secretary simply declined to intervene in the termination decision as requested by Alaska's Senators, effectively leaving the decision to the normal process.

¹⁹⁶ April 14, 1994, 4:00 PM e-mail message from BARTON to Michael A. Barton.

¹⁹⁷ Id. The fact mentioned by Barton that the Secretary wanted Alaska's Senators notified tracks with Schnoor's deposition testimony that she made the calls to the Senate offices for the Secretary because he was out of the country. (Schnoor deposition at page 179-180) Schnoor's testimony does not confirm the notion that the Secretary himself instructed the termination.

message to get on with signing, as did Adela Backiel to discuss communicating the termination.¹⁹⁸

Barton signed the letter;¹⁹⁹ the termination was official; and the facts that would result in liability of the United States of America for breach of contract were set.²⁰⁰ Whether Espy engaged and made or agreed with the termination or whether he simply elected not to intervene, the termination occurred.

A disturbing aspect of the activities leading to this breach of contract by the United States was the misleading nature of the decision-making by those well above the contracting officer who so callously ignored the information and the down-side to terminating the contract. It is clear the influence of the environmental lobby on OMB, the Assistant Secretary's office, and the legal staff of USDA was persuasive at critical junctures. To the detriment of the taxpayers, the environmental special interest groups got what they asked for when the show cause letter was sent in January and the termination occurred in April. It is clear that the Assistant Secretary's office drove the decision-making within the Department, while misleading APC into believing submissions to the contracting officer would or could influence the outcome of the contract dispute. It is clear as the decision approached the end point in early April, the contracting officer was entirely out of the decision-making process, and that Chief Thomas, Deputy Assistant Secretary Backiel, Assistant Secretary Lyons, Counsel Kim Schnoor, and perhaps Secretary Espy as well as underlings seized control of decision-making and, against the

¹⁹⁸ Id.

¹⁹⁹ Appendix 96-A, April 14, 1994, e-mail message from Michael A. Barton to Rene J. Booser; April 14, 1994, e-mail message from Michael A. Barton to Michael A. Barton; April 14, 1994 letter from Michael A. Barton to George Woodbury (termination letter).

²⁰⁰ Talking points were prepared (Appendix 96-C) and notification calls were made to the Alaska delegation and the press.

contracting officer's desires, ensured termination of APC's contract occurred.

In rendering this decision, it is very interesting where each participant pointed when asked who was responsible for terminating the APC contract. Barton, who should have made the decision, said that Chief Thomas instructed him to sign the letter and that he (Barton) did not make the decision. Barton's decision was to extend the contract. Thomas' testimony and the written record verify this. Thomas said that he did not know who actually made the decision, but that he was told by his superior what the decision was, and he informed Barton of the decision. Backiel points to everyone in the "group." It was a group decision according to her; she, Thomas, and Lyons got together and made a "recommendation" to terminate. While that recommendation was perhaps first accepted by the Secretary, it was subsequently rejected, at least for the time being while information was collected for the Secretary subsequent to his April 11, 1994, meeting with Alaska's Senators. At some point the Secretary may have decided not to intervene, but Lyons points to the Secretary as having made the decision after a meeting with Lyons and Schnoor after April 12, 1994. However, there is no corroboration of details concerning such meeting and subsequent decision to terminate by the Secretary. The person who supposedly made the call to inform Lyons of the decision (Schnoor) did not verify such a call to Lyons, and the Secretary did not recall making the decision. In fact, because it is now verified that the Secretary departed Andrews Air Force Base about an hour after the meeting with Alaska's Senators on April 11, 1994, it calls into question whether there was a meeting between Lyons, Schnoor, and the Secretary on the day the Secretary, according to Lyons, made the decision²⁰¹

²⁰¹ April 13, 1994, (according to Thomas' journal) or April 14, 1994, the day the termination letter was issued.

to terminate the contract. When asked whether he made the decision to terminate the APC contract, the Secretary said, “I don’t recall. I don’t think so, but I don’t recall.”²⁰² For his part, TJ Glauthier at OMB ensured that other parts of the Administration were involved in the decision-making about APC. These included the Department of Justice, Council on Environmental Quality, and others in the White House, more substantiation that “group” influences well above the contracting officer operated on the final decision to terminate the contract—or in Glauthier’s words, keep the termination decision “on track.”

The decision to terminate APC’s contract was the worst in big government. It was a decision without a verifiable maker that emanated from the big government “system.” Beyond Barton, the contracting officer who was uninvolved in the final decision and “recommended” an extension, the group who influenced or made the decision gave little or no consideration of information on the merits of APC’s contract dispute. There is no proof that any of the specific information considered by Mike Barton about the merits of APC’s feasibility work or the results of early Forest Service work to facilitate MDF conversion was considered by the decision-makers above Barton. Instead, Lyons seems to repeatedly invoked the notion that the absence of an unconditional commitment by APC to make an MDF conversion justifies termination, even though it was Barton’s judgment that led to the conclusion that APC was moving as fast as prudently possible making the business evaluation of installing MDF. In retrospect, particularly given the Court of Claims ruling that the company had no duty to operate a pulp mill, this rather weak rationale was no reason whatsoever to expose the

²⁰² Deposition of Alphonso M. Espy, June 3, 1999, page 58.

government to a claim that could reach over \$750,000,000. What is more, the decision and information put into it by Lyons and his underlings showed no careful or even cursory weighing of information submitted by APC to the contracting officer. It was based on little or no written legal analysis of potential exposure to the United States for breach of contract, although some analyses noted significant exposure could occur for wrongful termination.²⁰³ These deficiencies in decision-making were not even examined by the Court of Claims, because the issue of liability was largely decided on more straightforward contract interpretation grounds, grounds government lawyers should have been aware of and should have analyzed and those making decisions about APC should have been informed about.

VI. The United States Court of Federal Claims Decision

A. Court of Claims Summary Judgment

On May 25, 2000, Judge Baskir denied the government's motion for summary judgment and granted APC's cross-motion for summary judgment determining that APC did not have a contractual duty to operate a pulp mill for the entire fifty-year term of the contract.²⁰⁴ There were no facts in dispute, and the determination was rather straightforward. The court observed that when pulp mill operations were suspended, "APC investigated the possibility of converting the pulp mill into a facility to produce" MDF, and "several months past during which APC offered no firm commitment to convert

²⁰³ See, Appendix 50, Section II.C.3. of paper outlining a framework for response to APC's 10-21 and 10-22 letters.

²⁰⁴ Appendix 97, United States Court of Federal Claims, No. 95-153C, May 25, 2000, page 1-2.

the mill into an MDF facility.’²⁰⁵ Judge Baskir observed while APC had already satisfied its minimum cut requirement for the five year operating period, it continued to process wood in its sawmill to protect the remaining jobs.²⁰⁶ The January 13, 1994, letter from Barton to the company was the government’s notice that APC’s actions “in closing the mill constituted a material breach of the contract,”²⁰⁷ and notice that the government had a “vested right to an operating facility that uses pulp material.”²⁰⁸

The court acknowledged the “contract does not explicitly state continuous operation of the mill is required,” and rejected an examination of extrinsic evidence to determine if a continuous operation was indeed a contractual requirement for APC.²⁰⁹ Instead, the Court examined the words of the contract, including the preamble and terms. Then the Court observed what the government lawyers advising and litigating this case should have known long ago:

The defect in the government’s reliance on extrinsic evidence is thus more basic than even the venerable doctrine of parole evidence. By relying on disputed extrinsic evidence, the government introduced a fatal flaw in its own summary judgment motion—it attested to the existence of material facts in contention.²¹⁰

Both parties had already agreed that the contract is integrated, meaning that the written agreement

²⁰⁵ Id at 3.

²⁰⁶ Id.

²⁰⁷ Id.

²⁰⁸ Id.

²⁰⁹ Id. at 5. Interestingly, the Court observed that the government’s time and effort in developing extrinsic evidence to show that operation was required “might have been better spent.”

²¹⁰ Id.

constitutes the whole agreement.²¹¹

The Court then examined the words of the contract (the preamble and the general terms) and found no promises for a continued, unchanged operation for fifty years. None of the general terms—manufacture within Alaska (term 3), plant construction (term 4), and the general nature of the period of the contract (term 5a)—required operating a pulp mill. The Court examined the remainder of the contract and concluded a sharply worded opinion:

There are thirteen sections of substantive requirements within the contract. We note that the contract goes into minute detail on a number of subjects. In addition to the specifications of the pulp mill construction which we have already discussed, the contract details what type of trees to cut, how and when to cut them, and the rate of payment for each.

Having expressly provided for a host of other very specific requirements in painstaking detail exceeding forty pages, we can only assume that the contract's silence on a requirement to operate the pulp mill permanently or continuously was no oversight.

* * *

We have been offered no explanation for the omission of such a material term [a requirement to continuously operate the pulp mill] in a contract that was drafted by the government and offered to prospective bidders. Additionally we have been offered no guidance, and of course none exists in the contract, in determining the point at which APC runs afoul of a continuous operations obligation. Under the circumstances, we decline to find an unstated requirement to operate the mill permanently or continuously.

On this basis, the Court denied the government's motion for summary judgement and granted APC's cross-motion. The unsupported, imaginary linchpin *belief*—which is all the government's position ever was—of the existence of a requirement to operate the pulp mill vanished with Judge Baskir's decision. Thus, the government's termination was itself wrongful and became a breach of contract by the

²¹¹ Id.

government. The next thing to vanish will likely be a large sum of money from the U.S. Treasury to pay for this contract breach.

B. Nature of Damages

The scope of this oversight report does not allow substantial treatment of the issue of damages that flow from the government's termination of APC's contract.²¹² Based on Judge Baskir's ruling, the government will very likely be forced to pay damages from April 14, 1994, through the remaining life of the APC contract. However, the contract may have been breached by the government approximately four years earlier when Congress legislated modifications to the APC contract by enacting the Tongass Timber Reform Act. Still pending is a summary judgment motion on that issue, which if granted, will increase significantly the amount of damages for APC.

Indeed the Forest Service is aware of the potential impact that the APC damage claim will have on the operation of the Forest Service. In December 1999, the Director of Forest Management sent a memorandum to the Deputy Chief stating the cost of timber sale contract lawsuits, claims and other obligations "are beyond the Agency's ability to manage within existing budgets,"²¹³ in part, because there are "an unprecedented amount of claims and settlements."²¹⁴ Included in the agency's calculation

²¹²The basic methods to calculate damages are (1) the loss of value of assets (the amount that APC would be induced to spend in relying on the contract), (2) cost of cover (cost of obtaining substitute goods), and (3) lost profits (the profits that will not be realized over the remaining life of the contract). The government's own estimates of damages are included as Appendix 97-A.

²¹³ Appendix 98, December 6, 1999, Memorandum from Ann M. Bartuska to James Furnish.

²¹⁴ *Id.*

is the claim in FY 2000 and later for \$1,529,439,000 in Region 10, which is the APC claim.²¹⁵ The Forest Service is apparently preparing for the contingency that it may indeed pay this claim, which would be reimbursed from dollars appropriated to the agency.

VII. Recommendations

The business of the United States terminating a contract or even making any change to a contract is serious. The CDA system whereby government contracts are administered by contracting officers was designed to afford meaningful consideration of the issues facing the government as a party to a contract. When it works as contemplated through a contracting officer who accumulates information and makes judgments about the best position for the government, outcomes are usually considered outcomes. In the case of the APC contract, the appearance was created that the system would work as it should and a considered outcome from Barton would result. The highest corporate level of APC was directed to make company submissions to the designated contracting officer, Michael A. Barton, who was the decision-maker for APC's contract dispute. This was a proper *and fair* procedure for the government to follow in this contract dispute.

However, when the outcome or the "recommended" decision by Barton was not as desired by superiors of the contracting officer, the locus of the decision was moved from the contracting officer to a "group" or to the level of Assistant Secretary or perhaps even to the Secretary of Agriculture. APC was never notified that decision-making was moved or that anyone outside of the contracting officer (such as Thomas, Backiel, Lyons, the Secretary, or the White House) would make the decision or be in

²¹⁵ Id.

the position to override Barton's final decision. During the final two or three weeks of the decision to terminate the APC contract, the contracting officer was entirely removed from the decision, except for being instructed to sign the decision letter. Thus, the true decision-makers were able to hide their identity and terminate the contract for reasons beyond the specifics associated with the merits of APC's submissions. Thus, they were able to produce an expensive decision for the government without a specific written record and escape responsibility.

If the contracting officer would have been free to actually make a decision, the outcome—in terms of liability on the part of the government—would have been vastly different. APC would have received an extension, and the government's position would have been bolstered had the company not gone through with converting their mill into an MDF plant. Had the plant been constructed, everyone would have benefitted. Instead, the actual decision-makers and advisors reduced the decision to a three page informational memoranda for the Secretary of Agriculture, ignoring or omitting the substantive submissions of APC and not requiring any written legal support for this substantial decision.

Preventing future contract terminations without justification in a transparent, fair, and responsible government could be achieved by instituting requirements that contracting officers render decisions based on their own evaluation and judgment on the specifics of the dispute. If a superior to the contracting officer wished to make a contract decision, then the matter should then be removed *in writing* to that superior and the contractor notified. All decisions, whether by the contracting officer or the superior would need to be *supported in writing*—on the merits and substance of the decision, and the legal basis for the decision would need to be explained through *an accompanying legal opinion*. These requirements could be instituted for contract disputes in excess of a particular dollar amount.

The result would be a more transparent decision based on the merits of an issue, rather than an obscure decision from the depths of “big government” at the urging of special interest groups.

On the issue of the impact of contract claims or judgments on the operations of the Forest Service (and its appropriated budgets), the federal agencies and Congress should consider settlements in cases such as APC, not in dollars from the judgment fund, but in a concession of trees (or an offering of trees) within the limits of the renewable capacity of the forest over a period of time. Such an approach could result in a fair and marketable remedy for companies that have been wronged. It could also be an ecologically based solution, have an insignificant impact on the operations of the Forest Service, and produce an outcome in the public interest.